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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

LIBERTY NATIONAL BANK AND TRUST COMPANY,
Petitioner,

v.

STATE OF NORTH DAKOTA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

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QUESTIONS PRESENTED

1. Whether the court below correctly decided that 12 U.S.C. §29, the provision of the National Bank Act of 1864, 12 U.S.C. §§21 *et seq.*, which establishes the allowable period for national banks to hold real estate acquired in satisfaction of debts previously contracted, does not pre-empt provisions of the North Dakota corporate farming law, N.D. Cent. Code ch. 10-06, which establish a different holding period for national banks in North Dakota with respect to ranchland and farmland acquired in satisfaction of debts previously contracted.

2. Whether this case satisfies the "capable of repetition, yet evading review" standard, and therefore may be accepted by this Court for resolution on the merits.

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STATE OF NORTH DAKOTA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

The Petitioner, Liberty National Bank and Trust Company, a national bank chartered under the laws of the United States, petitions for a Writ of Certiorari to review the judgment of the Supreme Court of the State of North Dakota in this case.

OPINIONS BELOW

The opinion of the North Dakota Supreme Court (Appendix at pages 1a-19a) is not yet reported. The opinion of the District Court for the Southwest Judicial District, County of Slope, State of North Dakota (Appendix at pages 20a-26a) is not reported.

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[1] Petitioner has no parent companies, subsidiaries or affiliates which are required to be disclosed pursuant to Rule 28.1.

JURISDICTION

This is a Petition for a Writ of Certiorari to review a final judgment of the Supreme Court of the State of North Dakota upholding the validity of Chapter 10-06, as applied to national banks, against a claim that Chapter 10-06 is pre-empted by 12 U.S.C. §29. The federal question sought to be reviewed here was first raised at the trial level on March 18, 1987, by Petitioner's timely Answer, Appendix at pages 32a-35a to the February 9, 1987, Complaint by the State of North Dakota, Appendix at pp. 28a-31a. In its Answer, Petitioner averred, *inter alia*, that N.D. Cent. Code ch. 10-06: (1) does not apply and was not meant to apply to national banking associations; and (2) is pre-empted and, therefore, inapplicable to Petitioner by virtue of 12 U.S.C. §29. The preemption issue was again raised in Petitioner's motion for summary judgment, and was the specific issue ruled upon by the district court in its judgment in favor of Petitioner on August 17, 1987. Respondent thereafter gave written notice of its appeal to the North Dakota Supreme Court. After full briefing of the federal issue and oral argument, the court ruled that Chapter 10-06 is not preempted by 12 U.S.C. §29.

The judgment of the North Dakota Supreme Court was entered on June 28, 1988. No petition for rehearing was filed. The Mandate of the court was extended, under the provisions of Rule 41(b) of the North Dakota Rules of Appellate Procedure, for a thirty-day period on July 18, 1988, and was again extended on August 16, 1988, under the same authority, until September 26, 1988. The jurisdiction of

this Court is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Supremacy Clause to the United States Constitution, U.S. Const., Art. VI, cl. 2, provides in relevant part:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

2. The statute which establishes the time period which national banks may hold real estate obtained in satisfaction of debts previously contracted, 12 U.S.C. §29 provides in pertinent part as follows:

§29. Power to hold real property

A national banking association may purchase, hold, and convey real estate for the following purposes, and for no others:

First. Such as shall be necessary for its accommodation in the transaction of its business.

Second. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted.

Third. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

Fourth. Such as it shall purchase at sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts due to it.

But no such association shall hold the possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it, for a longer period than five years except as otherwise provided in this section.

For real estate in the possession of a national banking association upon application by the association, the Comptroller of the Currency may approve the possession of any such real estate by such association for a period longer than five years, but not to exceed an additional five years, if (1) the association has made a good faith attempt to dispose of the real estate within the five-year period; or (2) disposal within the five-year period would be detrimental to the association. Upon notification by the association to the Comptroller of the Currency that such conditions exist that require the expenditure of funds for the development and improvement of such real estate, and subject to such conditions and limitations as the Comptroller of the Currency shall prescribe, the association may expend such funds as are needed to enable such association to recover its total investment.

Notwithstanding the five-year holding limitation of this section or any other provision of this chapter, any national banking association which on the date of enactment of this paragraph held, directly or indirectly, real estate, including any subsurface rights or interests therein, that since December 31, 1979, had not been valued on the books of such association for more than a nominal amount, may continue to

hold such real estate, rights, or interests for such longer period of time as would be permitted a State chartered bank by the law of the State in which the association is located if the aggregate amount of earnings from such real estate, rights, or interests is separately disclosed in the annual financial statements of the association.

3. The Comptroller of the Currency's regulation implementing and interpretating 12 U.S.C. §29, 12 C.F.R. §7.3025 (1988), provides in pertinent part:

§7.3025 Other real estate owned.

(a) "Other real estate owned" is:

(1) Real estate acquired by a national bank:

(i) Through purchases at sales under judgments, decrees, or mortgages where the property was security for debts previously contracted;

(ii) Through conveyance in satisfaction of debts previously contracted; or

(iii) Through purchases to secure debts previously contracted;

* * *

(e) The bank must maintain current documentation reflecting its continuing and diligent efforts to dispose of each parcel of other real estate owned. Other real estate owned must be disposed of within the holding period permitted by 12 U.S.C. 29 at any time that prudent judgment dictates, but in no event later than the end of such holding period. However, if at any time before the end of the holding period the bank can recover the amount of its original loan plus ad-

ditional advances and other costs related to the loan or the parcel of other real estate owned, it should promptly dispose of the parcel. The holding period of 12 U.S.C. 29 begins on the date that legal title to the property is transferred to the bank, except for real estate for which banking use is no longer contemplated and property sold in a covered transaction. . . .

* * *

(h) The bank must obtain annually from an independent, qualified appraiser a current appraisal of fair value for each parcel of other real estate owned or certification, in letter form, that the fair value has not declined. . . .

4. The North Dakota corporate farming law, N.D. Cent. Code Ch. 10-06, provides in pertinent part:

10-06-01. Farming or ranching by corporations prohibited . . . .

All corporations, except as otherwise provided in this chapter, are prohibited from owning or leasing land used for farming or ranching and from engaging in the business of farming or ranching.

10-06-13. Enforcement—Penalty.

* * *

4. Subject to the divestiture requirements of subsections 5, 6, and 7, a domestic or foreign corporation may acquire farmland or ranchland as security for indebtedness, by process of law in the collection of debts, or by any procedure for the enforcement of a lien or claim thereon, whether created by mortgage or otherwise.

5. Unless retention of the farmland or ranchland is permitted under subsection 6 or 7, all farmland or ranchland acquired as security for indebtedness, in the collection of debts, or by the enforcement of a lien or claim shall be disposed of within three years after acquiring ownership, if the acquisition would otherwise violate this chapter.

6. The disposition requirement does not apply to a corporation that has acquired title to the land through the process of foreclosure of a mortgage, or a deed from a mortgagor, or a deed from a mortgagor instead of a foreclosure, if, by the expiration of one month after what is or what would have been if the mortgage had been foreclosed the redemption period of the mortgage, that corporation leases to the prior mortgagor from who it was acquired, with an option to purchase, and if documents evidencing the lease agreement have been filed with the register of deeds of each county in which the land is located. A copy of a notice of lease is sufficient evidence. The exemption in this subsection applies for only five years and then only if the property has been appraised in accordance with subsection 8. The annual lease payments required of the tenant cannot exceed seven percent of the appraised value.

7. The disposition requirement does not apply to a corporation that has acquired title to the land through the process of foreclosure of a mortgage, or a deed from the mortgage, or a deed from the mortgagor instead of foreclosure, if, by the expiration of one month after what is or what would have been if the mortgage had been foreclosed the redemption period of the mortgage, that corporation contracts for the

sale of the land to the prior mortgagor from whom it was acquired. . . .

STATEMENT

Petitioner is a national banking association which received its federal charter in 1916 pursuant to the provisions of the National Bank Act of 1864, 12 U.S.C. §§21 *et seq.* As such, it is subject to examination and regulation by the Office of the Comptroller of the Currency, a bureau of the United States Department of the Treasury, *see* 12 U.S.C. §§1 *et seq.* This case concerns the relationship between 12 U.S.C. §29, the federal statute which establishes the allowable holding period for a national bank holding real estate acquired in satisfaction of debts previously contracted and the Comptroller's regulation which implements Section 29, and the North Dakota corporate farming statute, N.D. Cent. Code, ch. 10-06, which establishes a holding period for corporations, including national banks, holding farmland or ranchland in North Dakota acquired in satisfaction of indebtedness different than that provided in Section 29.

Section 29 authorizes a national bank to hold real estate acquired in foreclosure for a five-year period. Upon application to the Comptroller, the original five-year period may be extended for up to an additional five years if (1) the association has made a good faith effort to dispose of the real estate, and (2) disposal of the real estate within the original five year period would be detrimental to the association. The Comptroller's regulation relating to such real estate, 12 C.F.R. §7.3025, requires a national bank to dispose of its real estate within the holding period permitted by Section 29 "at any time prudent judgment dic-

tates," i.e. when the bank can recover the amount of its original loan plus additional advances and other costs related to the loan, and, in any event, not later than the end of the holding period. The corporate farming law, Chapter 10-06, provides a three-year holding period for corporations doing business in North Dakota to hold ranchland and farmland acquired in foreclosure. This three-year period may be extended for an additional five-year period if lender leases the real estate to the prior mortgagor with an option to purchase the property, and does not apply altogether where the lender contracts for the sale of the land to the prior mortgagor. The decision below holds that the North Dakota statute, not the federal statute, is applicable to national banks operating in North Dakota.

The facts giving rise to the litigation may be summarized briefly. A borrowing customer of Petitioner defaulted on a $150,000 loan secured in part by a real estate mortgage covering 320 acres of farmland located in Slope County, North Dakota. In order to avoid foreclosure of the mortgage, the customer conveyed the 320 acres to Petitioner by warranty deed dated September 19, 1983. The agreed value of the land, approximately $107,000, was credited upon the loan's indebtedness. Petitioner leased the property to customer with an option to purchase from 1983 to 1986, until the customer notified the bank that he was no longer in a position to attempt to purchase the land, and that he had quit farming and had no further desire or intention to purchase or lease the property. Petitioner thereafter leased the farmland to maintain it as an efficient operating farm unit and

attempted to locate purchasers by seeking private bids and listing the property with a realtor.

Petitioner, however, received no offers within the three-year holding period provided by Chapter 10-06 other than offers which would cause it to suffer a substantial loss on the property. Petitioner attributes its inability to dispose of the property to the depressed economic conditions existing in western North Dakota, particularly in the area of farming. The highest bid for the property received by Petitioner during that period was $64,000, which was substantially below the appraised value of the property. In 1987, nearly four years after it foreclosed on the real estate, Petitioner sold the property at a price which, though a loss, gave Petitioner a better return on its investment than it would have gotten had it been forced to sell the property in the previous year.

Respondent initiated this action pursuant to Chapter 10-06 to force Petitioner to divest the real estate it had held for more than the three-year holding period. In its complaint and its request for summary judgment in the District Court for Slope County, Respondent averred that Petitioner is a corporation within the meaning of Chapter 10-06, that Petitioner was in violation of Chapter 10-06, that no exception contained therein was applicable to Petitioner, and that Chapter 10-06 was meant to apply to national banking associations. Respondent requested the court to order Petitioner to divest the real estate and, if Petitioner failed to obey such order, to order the North Dakota Secretary of State to dissolve Petitioner or to order Petitioner to cease doing business in North Dakota.

In its answer and its return and motion for summary judgment, Petitioner argued that Chapter 10-06 does not apply and was not meant to apply to national banking associations and that Chapter 10-06 is pre-empted and inapplicable to Petitioner by virtue of Section 29. On August 17, 1987, the district court granted Petitioner's motion for summary judgment, relying on this Court's decision in *Fidelity Federal Savings and Loan Association v. De La Cuesta*, 458 U.S. 141 (1982). The court stated:

> There does indeed exist in the case at bar a fundamental conflict between Chapter 10-06 of the North Dakota Century Code and 12 U.S.C. §29. [In *Fidelity Federal v. De La Cuesta*] the United States Supreme Court recognized that the relative importance to the State of its own law is not material when there is a conflict with a valid Federal law. The United States Government by granting to banks with national charters the opportunity to dispose of real property acquired in the ordinary course of their business, has expressly granted to such national banks flexibility within their internal operations and accordingly to suggest that an reduction of that period of time by state statute is not a conflict, is without merit. Appendix at pp. 24a-25a.

On appeal, the North Dakota Supreme Court reversed. At the outset, the court noted that, although Petitioner had sold the land involved in the lawsuit after the court had heard oral argument, the court would not dismiss the appeal as moot since the matter was of great public interest involving the authority

of public officials and was "capable of repetition, yet evading review." Appendix at p. 3a.

The court then concluded that there is no actual conflict between Section 29 and Chapter 10-06, because, in the court's view, the state law does not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting Section 29. Rather, the court found that "the primary purpose of each law is the same, *i.e.* preventing banks and corporations from becoming monopolistic holders of real estate," and noted a "similar congruity" in the secondary purpose of each statute, *i.e.*, providing "a measure of protection to banks and corporations through the respective legislative bodies' reasonable choices of appropriate divestiture periods." Appendix at p. 16a.

The court also found that chapter 10-06 does not frustrate Congress' objectives in authorizing the Comptroller to extend the initial five-year holding period in Section 29, since the North Dakota legislature, like Congress, had eased the three-year limitations by allowing exemptions. The court stated that "[w]hile the exemptions under state law are more narrowly drawn than those allowed by §29, the [North Dakota] Legislature could reasonably determine that the exemptions will provide adequate protection for the banks . . . ." Appendix at p. 17a.

REASONS FOR GRANTING THE PETITION

This case presents important questions concerning the preemption of state laws by the National Bank

Act and the appropriate role of the Comptroller of the Currency in the administration of that Act. The North Dakota Supreme Court has held that provisions of the National Bank Act governing real estate holding periods applicable to national banks do not preempt provisions of North Dakota law which establish different and conflicting holding period requirements for national banks operating in North Dakota. As a result, the Court has nullified 12 U.S.C. §29 in an attempt to further the purposes and objectives of the North Dakota statute.

The ruling below seriously misconstrues this Court's preemption decisions, particularly the decision in *Fidelity Federal Savings & Loan Association v. De La Cuesta*, 458 U.S. 141 (1982). In nullifying the federal statute, the court focused on the arguable similarity of one common purpose of the two statutes, while completely ignoring the means which Congress furnished to effectuate the purposes of Section 29, and the plenary authority of the Comptroller to administer Section 29. By doing so, the court endorsed a patent conflict between the state and federal law. In light of the vulnerability of national banks nationwide, by virtue of the decision below, to corporate farming and other state laws which directly conflict with the National Bank Act, and in light of the resulting threat to the dual banking system established by Congress, a review by this Court of the decision below is essential.

1. THE PRE-EMPTION DOCTRINE.

It is well established by decisions of this Court that state law is preempted to the extent that it actually conflicts with federal law. As the Court stated in *Fidelity Federal Savings and Loan Association v. De*

La Cuesta, 458 U.S. 141, 153 (1982), "[s]uch a conflict arises when compliance with both federal when state regulations is a physical impossibility . . . or the state law in question stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress . . . ." *see Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963) (physical impossibility); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (purposes and objectives of Congress); *Jones v. Rath Packing Co.*, 430 U.S. 519, 526 (1977). Nor is a direct conflict permitted "simply because real property law is a matter of special concern to the states: the relative importance to the state of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail.' " *Fidelity Federal Savings and Loan Association v. De La Cuesta*, 458 U.S. at 153 (quoting, *Free v. Bland*, 369 U.S. 363, 366 (1962)).

With respect to laws applicable to national banks specifically,

> "state law which attempts to define their duties or control the conduct of their affairs are void whenever such attempt and exercise of authority conflicts with the laws of the United States and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the federal government to discharge their duties, for the performance of which they were created.

Davis v. Elmira Savings Bank, 161 U.S. 275 (1895); *see Easton v. Iowa*, 188 U.S. 220 (1903); *First National Bank of San Jose v. California*, 262 U.S. 366

(1923); *Franklin National Bank of Franklin Square v. New York*, 347 U.S. 373 (1954).

2. THE NATIONAL BANK ACT OF 1864 PRE-EMPTS NORTH DAKOTA LAW

A. N.D. CENT. CODE, CHAPTER 10-06 STANDS AS AN OBSTACLE TO THE ACCOMPLISHMENT AND EXECUTION OF THE FULL PURPOSES AND OBJECTIVES OF CONGRESS IN ENACTING SECTION 29.

The purposes and objectives of Congress in enacting Section 29, as amended, were to (1) prevent national banks from gaining a monopoly on real estate, (2) keep bank capital in relatively liquid form and prevent national bank speculation in real estate, *see National Bank v. Matthews*, 98 U.S. 621, 626 (1878), and (3) provide a mechanism for the orderly and timely disposition of real estate held in foreclosure without loss by national banks. Congress' chosen means of effectuating these policies and objectives are the imposition of the initial five-year holding period, as monitored and administered by the Comptroller through its general examination and regulatory authority, and the grant of authority to the Comptroller to approve extensions of the five-year period and to set such conditions and limitations on the use of bank funds to further improve the property to enable the bank to save its investment.

Section 29 was enacted as part of the National Bank Act of 1864, Act of June 3, 1864, Ch. 106, §44, 13 Stat. 112 (Rev. Stat. §5137). As the court below correctly states, Appendix at pp. 9a-10a, Congress after careful deliberation established the five-year holding period as an appropriate period to effectuate the dual policies of (1) preventing a monopoly on land holdings by national banks, and (2) providing national banks with sufficient time to "make every prudent

and proper arrangement" for the disposal of real estate acquired in satisfaction of their debts. Cong. Globe, 38th Cong., 1st Sess., 1352, 2019-2020 (1864). (Statement of Sen. Davis).

The two most recent amendments to Section 29 significantly increased the flexibility of national banks to dispose of real property in a manner which would prevent loss. Section 401(a) of the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132 (1980), amended Section 29 to give the Comptroller authority to extend the initial five-year period upon a showing that the bank seeking the extension had made a good faith effort to dispose of the real estate within five years or that disposal of the real estate within the five-year period would be detrimental to the bank. In addition, Section 401(a) provided that a bank may expend funds for the development and improvement of real estate, subject to such conditions and limitations as the Comptroller shall prescribe, if such expenditures are needed to enable the bank to recover its total investment. In his support and explanation of the amendment, Comptroller Heimann stated that:

> With the development of modern banking [the five-year holding period in Section 29] . . . often results in unnecessary hardship. It does not take into account depressed economic conditions which might prevent disposal of real estate at prices reflecting the bank's investment, and it also adversely conditions the market, since prospective purchasers are aware that the sale is compulsary. National banks are thus prevented from mitigating or avoiding their losses, . . .

125 Cong. Rec. 14,599 (June 13, 1979) (letter from John G. Heimann, Comptroller of the Currency, to Honorable William Proxmire, Chairman, Committee on Banking, Housing and Urban Affairs, United States Senate, dated May 31, 1979.) Comptroller Heimann further supported the amendment to Section 29 because it provided needed flexibility to the Comptroller's Office to handle exceptional circumstances. *Id.*

Section 413 of the Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1521, Title IV, §413 (October 15, 1982) also gave national banks additional flexibility by providing that a national bank may hold certain real estate for the same period that a state-chartered bank could hold such real estate by virtue of the law of the state in which the national bank is located. Thus, the legislative history of Section 29 displays Congress' desire to provide flexibility for national banks to faciliate their disposal of real estate holdings in a safe and sound manner without loss, and to give the Comptroller specific statutory oversight authority to supplement its general authority already provided under the National Bank Act.

The Comptroller's regulation implementing Section 29, 12 C.F.R. §7.3025, which was published for public comment twice before being released, effectuates the policies of Section 29. In the preamble to Section 7.3025, the Comptroller stated that the five-year holding period provided by Section 29 is "a maximum figure only, and that earlier sale is required if the bank can recover its full investment in the property . . . [t]his reflects the policy of 12 U.S.C. 29 that banks should not speculate in real estate." 44 Fed.

Reg. 46429, 46431 (August 8, 1979). Moreover, the Comptroller stated, such divestiture should occur even if "management feels the property has potential for further appreciation . . . ." *Id.* The regulation requires a national bank to dispose of "other real estate owned" within the holding period established by Section 29 at any time that prudent judgment dictates," i.e., whenever the bank can recover the amount of its original loan plus additional advances and costs. 12 C.F.R. §7.3025(e). Thus, the regulation reflects and implements Congress' policies of requiring national banks to diligently seek to dispose of other real estate owned while providing national banks with the necessary flexibility in situations where disposal of such real estate would result in loss to the bank.

In *Fidelity*, 458 U.S. 141, the Court reversed the decision of the Court of Appeals for the Ninth Circuit in denying the preemptive effect of regulations of the Federal Home Loan Bank Board, which permitted, but did not compel, federal savings and loan associations to use "due-on-sale" clauses in their mortgage contracts. Due-on-sale clauses generally provide that a mortgage lender may declare a loan fully due and payable upon a sale or other transfer of the property which is collateral for the loan. California law prohibited lenders, including federal savings and loan associations, from exercising due-on-sale clauses unless the lender could demonstrate that the transfer which triggered the due-on-sale clauses had impaired the lender's security. See, *Wellenkamp v. Bank of America*, 21 Cal.3d 943, 582 P.2d 970 (1978). The Court specifically overruled the court of appeal's conclusion that, because the purposes of both California and federal law were similar, i.e., "to assist federally dis-

tressed homeowners," 458 U.S. at 150, the California law did not stand as an obstacle to the purposes of the federal law. *See* 458 U.S. at 154-156.

Similarly, the court below decided erroneously that Chapter 10-06 did not stand as an obstacle to the purposes and objectives of Congress as embodied in Section 29, since the purposes of Chapter 10-06 were to "protect [the corporation's] legitimate business interests while preventing the accumulation of farmland and ranchland by such corporations," and thus were "identical" to the purposes of Section 29. Appendix at p. 14a. As this Court held in *Fidelity*, the similarity of the purposes of the federal and state law does not preclude pre-emption where the state law actually conflicts with the federal law. The state law here, though similar in purpose, "interferes with the methods by which the federal statute was designed to reach [its] . . . goal." *International Paper Co. v. Ouellette*, 479 U.S. ___, 93 L. Ed. 2d 883, 898 (1987); *Michigan Canners & Freezers Association v. Agricultural Marketing and Bargaining Board*, 467 U.S. 461, 477 (1984).

Absent the operation of certain narrow exceptions which were not available to Petitioner in this case, Chapter 10-06 infringes a national bank's right to hold foreclosed real estate for the period authorized by Section 29. The conflict "does not evaporate" because Section 29 permits, but does not compel, national banks to hold foreclosed real estate for five, and, possibly, up to ten years. 458 U.S. at 155. The North Dakota legislature, and the court below, require national banks to divest real estate within three years,

and have thus deprived national banks of the flexibility provided in Section 29 and the Comptroller's regulation. Chapter 10-06, as applicable to national banks must therefore be pre-empted.

Moreover, although one of the purposes of Chapter 10-06, preventing the accumulation of the State's real estate in the hands of corporations, is arguably similar to a purpose and objective of Section 29, preventing the accumulation of large portions of real estate in the hands of national banks, the purposes and objectives of Chapter 10-06 are certainly not "identical" to those of Section 29, as the court below has stated. Section 29 and the Comptroller's regulation also aim at ensuring that the safety and soundness of the national bank system is not impaired by risky speculation by banks in real estate or by the tying up of a bank's capital in non-liquid investments, and at ensuring that national banks may dispose of real estate in a timely and orderly fashion without loss. The North Dakota legislation does not seek to effectuate these additional purposes aimed as they are at the preservation of the national banking system, which is solely the concern of the Comptroller. Rather, as noted in the court below, an important purpose of Chapter 10-106 is to keep ranchland and farmland in the hands of the original ranchers and farmers through the promotion of incentives for banks and other lenders to work out repayment arrangements with borrowers. See Appendix at pp. 14a-15a. As is demonstrated is Petitioner's case, the effectuation of this policy can work hardship and loss on a national bank and thereby frustrate the objectives of Congress.

In this respect, Petitioner was unable to lease or resell its foreclosed property to the original borrower

and, therefore, could not partake of the time extensions provided in Chapter 10-06. Petitioner was thus required to divest the property after the three-year period regardless of the current conditions in the real estate market or whether the sale would result in a loss. By limiting the availability of the five-year period and extension procedure provided by federal law to afford its national banks sufficient "work-out" time to dispose of its foreclosure property, the operation of Chapter 10-06 creates "an obstacle to the accomplishment and execution" of Section 29. *Hines v. Davidowitz* 312 U.S. at 67.

B. FEDERAL LAW HAS OCCUPIED THE FIELD OF REGULATION OF NATIONAL BANK HOLDING OF REAL ESTATE.

Absent express preemptive language in a federal statute "Congress' intent to preempt state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress left no room for the States to supplant it." *Hillsborough County v. Automated Medical Labs,* 471 U.S. 707, 713 (1985); *see Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Cable Cities v. Crisp*, 467 U.S. 691 (1984). In this respect, the National Bank Act has long been regarded by this Court as "a comprehensive code creating and regulating the national banks of the United States, constituting by itself a complete system for the establishment and government of national banks." *Cook County National Bank v. United States*, 107 U.S. 445 (1883); See *Davis v. Elmira Savings Bank*, 161 U.S. 238 (1896); *Easton v. Iowa*, 188 U.S. 238 (1903); *Farmer's & Mechanics National*

Bank v. Dearing, 91 U.S. 29 (1885). While it is also true that national banks are subject to state law generally applicable to all persons and businesses, *see McClellan v. Chipman*, 164 U.S. 347 (1896) (state fraudulent conveyance statute); *Anderson National Bank v. Luckett*, 321 U.S. 233 (1944) (state escheat law); *Huntington Towers, Ltd. v. Franklin National Bank*, 559 F.2d 863 (2d Cir. 1977), *cert. denied*, 434 U.S. 1012 (1978) (statute of frauds), States lack the power to regulate national banks in areas specifically covered by the National Bank Act or regulations issued thereunder. *See Farmers & Mechanics National Bank v. Dearing, supra*; *Yonkers v. Downey*, 309 U.S. 590 (1940); *Davis v. Elmira Savings Bank, supra*; *Conference of State Bank Supervisors v. Conover*, 710 F.2d 858 (D.C. Cir 1983).

Congress in Section 29 provides a comprehensive system for the holding of real estate by national banks. Section 29 *prohibits* national banks from purchasing, holding and conveying real estate except in four narrow circumstances. As discussed *supra*, at p. 15-16, after some debate, Congress established five years as an appropriate period within which to dispose of real estate held by national banks. Congress further provided that this five years could be supplemented, if need be, with an additional five-year period. In this respect, Congress granted to the Comptroller general authority to administer the national banking laws, including Section 29, as well as specific statutory discretion to approve extensions of the original five-year period and the expenditure of by national banks of additional funds to recover their investment. It is well established that state law cannot displace the Comptroller's exercise of discretion granted under

the National Bank Act. *Conference of State Bank Supervisors* v. *Conover*, *supra*.

The federal statute and regulations thereunder thus constitute a comprehensive framework for the ultimate disposition of the four narrow categories of real estate which national banks may hold. There is no room thereunder for state law to operate.

2. THIS COURT HAS JURISDICTION TO DECIDE THIS CASE SINCE THE UNDERLYING DISPUTE IS ONE "CAPABLE OF REPETITION, YET EVADING REVIEW".

This Court has jurisdiction to review the decision below, despite the fact that Petitioner has sold the parcel of real estate which was the subject of Respondent's complaint, since the underlying dispute is "capable of repetition, yet evading review." *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911); *see Murphy v. Hunt*, 455 U.S. 486 (1982); *Nebraska Press Association v. Stuart*, 427 U.S. 548 (1976); *Weinstein v. Bradford*, 423 U.S. 347 (1975). The court below reached the same conclusion when it decided to retain jurisdiction. *See* Appendix at p. 3a.

The controversy is capable of repetition since there exists a reasonable expectation that the "same complaining party" will be "subject to the same action again." *Weinstein*, 423 U.S. at 349. The North Dakota Supreme Court's decision authorizes Respondent to enforce the three year divestiture requirement in cases involving national banks. An identical dispute between Respondent and a national bank in North Dakota,

perhaps even Petitioner, is therefore likely to occur, particularly in light of the decision below.

Further, if the Court does not decide the issues presented in this case the dispute will evade review since the challenged action, the holding by a national bank of real estate acquired in foreclosure, is by its nature an activity which is designed to be short-lived. The Comptroller's regulations impose on national banks an affirmative duty to diligently seek to dispose of such property. Moreover, such real estate represents a non-performing or under-performing asset on the bank's books and is therefore undesirable for the bank to hold, particularly in a depressed economic region or a slow real estate market where the bank stands to realize minimal or no appreciation on the property.

Thus, although the Comptroller's regulation allows, but does not require, national banks to hold real estate until it can be sold without loss, a bank's "best price" for a parcel of real estate in a depressed region or a slow market may well involve a loss to the bank upon its sale of the parcel. The decision to sell and achieve this price is a business decision of the bank's management which must be made and acted upon independently of any desire to preserve jurisdiction in litigation of this type.

Moreover, assuming that a bank does not or cannot receive an extension of the five-year divestiture period provided by Section 29, the two extra years provided are not sufficient to fully litigate an action brought by Respondent to enforce the three-year holding period in Chapter 10-06.

CONCLUSION

The Petition for a Writ of Certiorari should, therefore be granted.

Respectfully submitted,

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September 26, 1988

APPENDIX

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff and Appellant

v.

Liberty National Bank and Trust Company, a North Dakota Corporation, Defendant and Appellee

Civil No. 870256

Filed June 28,1988

Appeal from the District Court of Slope County, Southwest Judicial District, the Honorable Donald L. Jorgensen, Judge.

REVERSED.

Opinion of the Court by Levine, Justice.

Allen C. Hoberg (argued), Assistant Attorney General, Attorney General's Office, State Capitol, Bismarck, ND 58505, for plaintiff and appellant. Appearance by Nicholas J. Spaeth.

Mackoff, Kellogg, Kirby & Kloster, P.C., P.O. Box 1097, Dickinson, ND 58602-1097, for defendant and appellee; argued by Gordon W. Schnell. Appearance by Mary E. Maichel.

Keith C. Magnusson (argued), P.O. Box 1438, Bismarck, ND 58502, for amicus curiae N.D. Bankers Association.

State v. Liberty National Bank and Trust Company

Civil No. 870256

LEVINE, Justice.

The State appeals from a district court summary judgment dismissing its divestiture action against Liberty National Bank and Trust Company [Liberty National] on the ground that the three-year limitation for holding farmland under § 10-06-13(5), N.D.C.C., of the corporate farming laws is not applicable to Liberty National because the state provision is pre-empted by 12 U.S.C. § 29 of the National Bank Act. We reverse.

The facts are not disputed. Liberty National is a national bank chartered by and subject to the supervision of the Comptroller of the Currency pursuant to the National Bank Act of 1864, 12 U.S.C. § 21 *et seq.* Marvin D. Lutz defaulted on a $150,000 loan from Liberty National which was secured in part by a real estate mortgage covering 320 acres of farmland in Slope County. In order to avoid foreclosure of the mortgage, Lutz conveyed the 320 acres to the Bank by warranty deed dated September 19, 1983. The agreed value of the land, approximately $107,000, was credited upon the loan indebtedness. The Bank leased the land to Lutz with an option to purchase from 1983 to 1986, but in the fall of 1986 Lutz told the Bank he had quit farming and would not buy or lease the land. According to the Bank, it has attempted to locate purchasers by seeking private bids and listing the property with a realtor, but has not received any offers "for an amount which would prevent the Bank from suffering a substantial loss on its investment."

The State brought this action against Liberty National in February 1987 pursuant to § 10-06-13, N.D.C.C., to force the Bank to divest itself of the farmland because it had held the land for more than three years and none of the statutory exceptions for holding the land for a longer

period applied. The Bank admitted that none of the statutory exceptions applied, but claimed in its answer that the three-year holding period in § 10-06-13, N.D.C.C., was pre-empted by the five-year holding period in 12 U.S.C. § 29. The district court agreed with Liberty National and granted summary judgment dismissing the action. The State appealed.

After oral argument in this court, we were informed by counsel that Liberty National has sold the land involved in this lawsuit. We will not dismiss an appeal as moot where the matter in controversy is one of great public interest and involves the authority and power of public officials, or where the matter is " 'capable of repetition, yet evading review.' " *Matter of Prettyman*, 410 N.W.2d 533, 536 (N.D. 1987) [quoting *Forum Publishing Co. v. City of Fargo*, 391 N.W.2d 169, 170 (N.D. 1986) quoting *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 546, 96 S.Ct. 2791, 2797, 49 L.Ed.2d 683 (1976)].[1] The issue presented in this case is a question of great public interest and will have important consequences in the State's future enforcement of the corporate farming laws. Moreover, considering a bank's continuing obligation to attempt to divest itself of foreclosed property and the length of time required for a case to work its way through the trial and

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[1] Although *Matter of Prettyman*, 410 N.W.2d 533, 536 (N.D. 1987), might indicate that the factors of "great public interest," "authority and power of public officials," and "capable of repetition, yet evading review" must each be established before we will deem an appeal not moot, these factors are components of two separate tests for determining whether we will treat a case as moot. Whether the matter in controversy is one of great public interest *and* involves the authority and power of public officials is the test this court has historically employed in resolving mootness issues. *See North Dakota Wheat Growers' Ass'n v. Moore*, 52 N.D. 904, 204 N.W. 834 Syllabus 2 (1925); *State v. Stutsman*, 24 N.D. 68, 139 N.W. 83 Syllabus 1 (1912). We adopted as an alternate test the United States Supreme Court's doctrine of "capable of repetition, yet evading review" in *Forum Publishing Co. v. City of Fargo*, 391 N.W.2d 169, 170 (N.D. 1986).

appellate court processes, we believe that this issue is capable of repetition, yet evading review. We therefore conclude that the issue in this case is not moot and proceed to the merits.

PRE-EMPTION PRINCIPLES

National banks were brought into existence under federal legislation, are instrumentalities of the federal government, and are necessarily subject to the paramount authority of the United States. *First National Bank v. Missouri*, 263 U.S. 640, 656, 44 S.Ct. 213, 215, 68 L.Ed. 486 (1924). As such, Congress has the authority to determine the extent to which state law is pre-empted with respect to a national bank's activities. *See Federal Land Bank of St. Paul v. Lillehaugen*, 404 N.W.2d 452, 455 (N.D. 1987).

The standards for deciding a pre-emption question are well established. Essentially, federal pre-emption of state law can occur in one of three ways. First, Congress may explicitly define the extent to which it intends to pre-empt state law. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95-96, 103 S.Ct. 2890, 2898-2900, 77 L.Ed.2d 490 (1983). Express pre-emption of state law occurs when Congress specifically declares in a federal statute that it intends to pre-empt state law in a particular field. *See Exxon Corp. v. Hunt*, 475 U.S. 355, 106 S.Ct. 1103, 89 L.Ed.2d 364 (1986); *Aloha Airlines, Inc. v. Director of Taxation*, 464 U.S. 7, 104 S.Ct. 291, 78 L.Ed.2d 10 (1983).

Second, even when there is no express pre-emptive language, Congress may indicate an intent to occupy an entire field of regulation and thereby impliedly pre-empt state law. *See City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 93 S.Ct. 1854, 36 L.Ed.2d 547 (1973). Implied, or occupation of the field pre-emption can be inferred "where the pervasiveness of the federal regulation precludes supplementation by the States, where the federal

interest in the field is sufficiently dominant, or where 'the object sought to be obtained by the federal law and the character of obligations imposed by it . . . reveal the same purpose.' " *Schneidewind v. ANR Pipeline Co.*, ___U.S. ___, ___, 108 S.Ct. 1145, 1150, 99 L.Ed.2d 316 (1988) [quoting *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947)]. *See also Pacific Gas & Electric Company v. St. Energy Resources Conserv.*, 461 U.S. 190, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983).

Third, even when Congress has not intended to entirely displace state law in a particular area, state law is pre-empted to the extent that it "actually conflicts" with federal law. *Michigan Canners & Freezers v. Agricultural Bd.*, 467 U.S. 461, 469, 104 S.Ct. 2518, 2523, 81 L.Ed.2d 399 (1984). Conflict pre-emption occurs where compliance with both federal and state laws is a physical impossibility, *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941). *See also Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 104 S.Ct. 2694, 81 L.Ed.2d 580 (1984); *Philko Aviation, Inc. v. Shacket*, 462 U.S. 406, 103 S.Ct. 2467, 76 L.Ed.2d 678 (1983); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 98 S.Ct. 988, 55 L.Ed.2d 179 (1978).

Courts are reluctant to infer pre-emption, *Federal Land Bank of St. Paul v. Lillehaugen, supra*, and it is the burden of the party claiming Congress intended to pre-empt state law to prove it. *Perdue v. Crocker Nat'l Bank*, 38 Cal.3d 913, 216 Cal.Rptr. 345, 702 P.2d 503, 520 (1985), *appeal dismissed*, 475 U.S. 1001, 106 S.Ct. 1170, 89 L.Ed.2d 290 (1986). We also recognize that the pre-emption doctrine is "not inapplicable . . . simply because real property law is a matter of special concern to the States: 'The relative importance to the State of its own law is not material

when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail.' " *Fidelity Federal Sav. & Loan Ass'n v. de la Cuesta,* 458 U.S. 141, 153, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982) [quoting *Free v. Bland,* 369 U.S. 663, 666, 82 S.Ct. 1089, 1092, 8 L.Ed.2d 180 (1962)]. In the final analysis, "the question whether federal law in fact preempts state action in any given case necessarily remains largely a matter of statutory construction." L. Tribe, *American Constitutional Law* § 6-25, at p. 480 (2d ed. 1988). *See also Schneidewind v. ANR Pipeline Co., supra* ["A pre-emption question requires an examination of congressional intent."]

Liberty National does not contend that Congress has expressly pre-empted state holding periods for real estate. Nor does it contend that Congress, through enactment of the National Bank Act, has impliedly pre-empted the entire field of regulation over national banks. *See First National Bank v. Missouri, supra* ["[N]ational banks are subject to the laws of a State in respect to their affairs unless such laws interfere with the purposes of their creation, tend to impair or destroy their efficiency as federal agencies or conflict with the paramount law of the United States."]; *McClellan v. Chipman,* 164 U.S. 347, 356-357, 17 S.Ct. 85, 87, 41 L.Ed. 461 (1896); *Biby v. Union National Bank of Minot,* 162 N.W.2d 370, 375 (N.D. 1968). Rather, the Bank asserts that the state holding period for real estate is pre-empted by the federal law because an actual conflict exists. The Bank does not contend that the conflict exists because compliance with both the state and federal laws is a physical impossibility, but because the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

12 U.S.C. § 29

12 U.S.C. § 29 currently provides:

"§ *29. Power to hold real property*

"A national banking association may purchase, hold, and convey real estate for the following purposes, and for no others:

"First. Such as shall be necessary for its accommodation in the transaction of its business.

"Second. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted.

"Third. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

"Fourth. Such as it shall purchase at sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts due to it.

"But no such association shall hold the possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it, for a longer period than five years except as otherwise provided in this section.

"For real estate in the possession of a national banking association upon application by the association, the Comptroller of the Currency may approve the possession of any such real estate by such association for a period longer than five years, but not to exceed an additional five years, if (1) the association has made a good faith attempt to dispose of the real estate within the five-year period, or (2) disposal within the five-year period would be detrimental to the association. Upon notification by the association to the Comptroller of the Currency that such conditions exist that require the expenditure of funds for the development and improvement of such real

> estate, and subject to such conditions and limitations as the Comptroller of the Currency shall prescribe, the association may expend such funds as are needed to enable such association to recover its total investment.
>
> "Notwithstanding the five-year holding limitation of this section or any other provision of this chapter, any national banking association which on the date of enactment of this paragraph held, directly or indirectly, real estate, including any subsurface rights or interests therein, that since December 31, 1979, had not been valued on the books of such association for more than a nominal amount, may continue to hold such real estate, rights, or interests for such longer period of time as would be permitted a State chartered bank by the law of the State in which the association is located if the aggregate amount of earnings from such real estate, rights, or interests is separately disclosed in the annual financial statements of the association."

When originally enacted in 1864 as part of the National Bank Act, § 29 did not provide for any exceptions to the five-year holding limitation for possession of real estate purchased to secure debts. The Supreme Court has stated that the primary objective of the restrictions placed upon national banks "was obviously threefold. It was to keep the capital of the banks flowing in the daily channels of commerce; to deter them from embarking in hazardous real-estate speculations; and to prevent the accumulation of large masses of such property in their hands, to be held, as it were, in mortmain." *National Bank v. Matthews*, 98 U.S. 621, 626, 25 L.Ed. 188 (1878); *see also First Nat'l Bank of Bellaire v. Comp. of Currency*, 697 F.2d 674, 681 (5th Cir. 1983). It has also been said that the restrictions were "designed to protect bank depositors and stockholders from risky investments." *Central Nat'l Bank v. Fleet-*

wood Realty Corp., 110 Ill.App.3d 169, 441 N.E.2d 1244, 1250-1251 (1982); *see also Exchange Bank of Commerce v. Meadors*, 199 Okl. 10, 184 P.2d 458, 463 (1947). The legislative history reveals that although the primary purpose of the original five-year limitation was undoubtedly to prevent national banks from becoming extensive and monopolistic holders of real estate, Congress also considered the adverse consequences of forced divestitures on the banks.

As originally proposed, the National Bank Act contained no time limitation on the holding of real estate. The House of Representatives sought to remedy this lack of a limitation period by an amendment requiring real estate not necessary for the bank's business "to be offered for sale at public auction at the door of the banking house of such association within six months after acquiring the title to the same. . . ." Cong. Globe, 38th Cong., 1st Sess. at 1352 (1864) (statement of Rep. Holman). This amendment was withdrawn by its sponsor after an opponent termed it "vicious and injudicious" and stated that "[i]f there be such a depression as there was in 1837 and 1857, and it should continue for two or three years, this provision would compel the banks to sell the land which they might hold instead of letting them hold it to a future time when it may be disposed of to advantage." Cong. Globe, *supra* (statement of Rep. Stevens).

The five-year limitation period was subsequently offered as an amendment in the Senate. *See* Cong. Globe, 38th Cong., 1st Sess. at 2019-2020 (1864). This amendment was also attacked because it would allegedly "operate very injuriously and be hard on the banks" and would "restrain them or compel them to sell unreasonably or may even impose on them an impossible condition." Cong. Globe, *supra,* at 2020 (statement of Sen. Sherman). The amendment was agreed to, however, after its sponsor stated:

> "It seems to me that it would be impolitic and might turn out to be mischievous to allow a bank

> thus indefinitely to acquire and indefinitely to hold the title and possession of real estate. I think it is a monopoly in the acquisition of real estate that ought not to be allowed to a bank. The time of five years which I have fixed within which to compel it to part with the title and possession of real estate that it may purchase in satisfaction of its debts, may be too short, but I should think it would be ample. If that time is too short, let a further extension within a reasonable period be proposed. It seems to me that five years is ample time to enable a bank to make every prudent and proper arrangement in the disposition of any real estate it may purchase in satisfaction of its debts." Cong. Globe, *supra* (statement of Sen. Davis).

Thus, Congress' choice of the five-year limitation period reflects its reasoned judgment in tempering the adverse consequences arising from its primary goal of preventing banks from becoming monopolistic holders of real estate.

Although the benefit of providing an extension of the five-year limitation was first recognized in the debates concerning the 1864 legislation, it was not until 1980 that Congress amended § 29 to allow an extension under certain circumstances. The current provision, allowing the Comptroller of the Currency to extend the holding period to a maximum of ten years if a good faith attempt is made to dispose of the property within the five-year period or if it appears that disposal would be detrimental to the bank, was introduced at the request of the Comptroller as one of several "noncontroversial," "housekeeping" amendments to the national banking laws which became part of the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, § 701(a), 94 Stat. 132, 186 (1981). *See* S. Rep. No. 96-368, 96th Cong., 2d Sess. 13, *reprinted in* 2 1980 U.S. Code Cong. & Ad. News 236, 249; 125 Cong. Rec. 14,597 (1979). In seeking

the amendment, the Comptroller expressed concern that the five-year limitation period "does not take into account depressed economic conditions which might prevent disposal of real estate at prices reflecting the bank's investment. . . ." 125 Cong. Rec. 14,599 (1979) (letter from John G. Heimann, Comptroller of the Currency, to William Proxmire, Chairman, Committee on Banking, Housing and Urban Affairs, U.S. Senate, dated May 31, 1979).

The most recent amendment to § 29 came two years later when Congress enacted the Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, § 413, 96 Stat. 1469, 1521-1522 (1984). This amendment permits certain national banks holding real estate which has been nominally valued in their books since December 31, 1979, to continue to hold this real estate for such further period of time as permitted by the law applicable to state chartered banks in the state in which the owning bank is located. *See* Sen. Rep. No. 97-536, 97th Cong. 2d Sess. 33, 62, *reprinted in* 3 1982 U.S. Code Cong. & Ad. News 3087, 3116. The legislative history on this particular provision, however, is sparse.

The primary purpose of § 29 remains unchanged. Section 29 is still directed to the goal of preventing national banks from accumulating large amounts of real estate. However, the 1980 and 1982 amendments reflect Congress' intent to provide banks some relief from the rigidity of the original absolute five-year limitation.

SECTION 10-06-13, N.D.C.C.

Section 10-06-01, N.D.C.C., provides that "[a]ll corporations, except as otherwise provided in this chapter, are prohibited from owning or leasing land used for farming or ranching and from engaging in the business of farming or ranching." Certain exemptions from this prohibition are set forth in § 10-06-13, N.D.C.C.

"10-06-13. Enforcement.

* * * * *

"4. Subject to the divestiture requirements of subsections 5, 6, and 7, a domestic or foreign corporation may acquire farmland or ranchland as security for indebtedness, by process of law in the collection of debts, or by any procedure for the enforcement of a lien or claim thereon, whether created by mortgage or otherwise.

"5. Unless retention of the farmland or ranchland is permitted under subsection 6 or 7, all farmland or ranchland acquired as security for indebtedness, in the collection of debts, or by the enforcement of a lien or claim shall be disposed of within three years after acquiring ownership, if the acquisition would otherwise violate this chapter.

"6. The disposition requirement does not apply to a corporation that has acquired title to the land through the process of foreclosure of a mortgage, or a deed from a mortgagor instead of a foreclosure, if, by the expiration of one month after what is or what would have been if the mortgage had been foreclosed the redemption period of the mortgage, that corporation leases to the prior mortgagor from whom it was acquired, with an option to purchase, and if documents evidencing the lease agreement have been filed with the register of deeds of each county in which the land is located. A copy of a notice of lease is sufficient evidence. The exemption in this subsection applies for only five years and then only if the property has been appraised in accordance with subsection 8. The annual lease payments required of the tenant

cannot exceed seven percent of the appraised value.

"7. The disposition requirement does not apply to a corporation that has acquired title to the land through the process of foreclosure of a mortgage, or a deed from the mortgagor instead of foreclosure, if, by the expiration of one month after what is or what would have been if the mortgage had been foreclosed the redemption period of the mortgage, that corporation contracts for the sale of the land to the prior mortgagor from whom it was acquired, and if documents evidencing the purchase agreement have been filed with the register of deeds of each county in which the land is located. A copy of a notice of the contract for deed is sufficient evidence. An exemption under this subsection is valid only if an appraisal has been made in accordance with subsection 8, and if it is valid, the exemption is unlimited in duration. The sale price cannot exceed the price determined by the appraisers."

In 1932 North Dakota voters approved an initiated measure which became known as North Dakota's anti-corporate farming law. *See* Note, *An Analysis of House Bill 782: The Latest Attempt to Repeal North Dakota's Ban on Corporate Farming,* 44 N.D.L.Rev. 255, 256 (1968). That initiated measure is currently found in amended form in Chapter 10-06, N.D.C.C. *See State v. J. P. Lamb Land Company,* 401 N.W.2d 713, 715 (N.D. 1987). When the law was originally adopted, "North Dakota was at the bottom of the great depression" and the "Act was aimed in large measure at life insurance companies and out-[of]-state corporate lenders which had foreclosed on thousands of acres of North Dakota agricultural land." McElroy, *North Dakota's Anti-Corporate Farming Act,* 36

N.D.L.Rev. 96 (1960). *See also* Note, *supra,* 44 N.D.L.Rev. at 256-257.

Numerous efforts to alter the prohibition against corporate farming finally succeeded in 1981. *See* 1981 N.D.Sess.Laws Ch. 134;; Note, *North Dakota's Corporate Farming Statute: An Analysis of the Recent Change in the Law,* 58 N.D.L.Rev. 283, 286-287 (1982). The three-year divestiture period for creditor corporations was part of this legislation. The statute required that "[a]ll farm or ranch land acquired as security for indebtedness . . . be disposed of within three years after acquiring ownership . . .," and, like the original 1864 federal legislation, did not provide any exceptions for extending the divestiture period. 1981 N.D.Sess.Laws Ch. 134, § 10. While the legislative history concerning this particular facet of the legislation is meager, we agree with the observation that the intent, as well as the "practical effect of the 1981 restrictions on creditor corporations is to protect their legitimate business interests while preventing the accumulation of farm and ranch land by such corporations." Note, *supra,* 58 N.D.L.Rev. at 292 (footnote omitted). Thus, the purposes and goals underlying the original 1981 state three-year divestiture period are identical to those underlying the original 1864 federal five-year divestiture period.

The extension periods for divestiture under state law were enacted by the Legislature in 1985. *See* 1985 N.D.Sess.Laws Ch. 146, § 1. A five-year extension beyond the initial three-year period is allowed to a creditor corporation if the corporation leases with an option to purchase to the mortgagor from whom the land was acquired. *See* § 10-06-13(6), N.D.C.C. The extension period is unlimited in duration if the creditor corporation contracts for the sale of the land to the prior mortgagor. *See* § 10-06-13(7), N.D.C.C. The legislative history reveals that the purpose of this legislation was to encourage lenders to work out problems and negotiate with mortgagors. *See* Minutes of the House Agriculture Committee, H.B. 1636, February

7, 1985; Minutes of the Senate Agriculture Committee, H.B. 1636, February 28, 1985, March 8, 1985, March 15, 1985, and March 26, 1985. It was further believed that by encouraging lenders to work out repayment arrangements with the borrower, land would be kept off the market, thereby halting the decline in farm real estate values, so that lenders, as well as borrowers, would benefit. Minutes of the Senate Agriculture Committee, H.B. 1636, February 28, 1985, and March 26, 1985 (statements of Rep. R. Meyer).

Thus, the primary purpose of the three-year divestiture period under state law, like the primary purpose of the five-year divestiture period under § 29, is to prevent the accumulation of farmland and ranchland by corporations. Furthermore, the State Legislature, like Congress, has attempted, through recent amendments, to alleviate the rigidity of the three-year period by providing for extensions under certain circumstances.

ANALYSIS

Counsel have cited numerous cases in support of their respective positions. The cases cited are not particularly helpful, other than for statements of general pre-emption principles, because none addresses the specific issue we face here. Perhaps *Omaha Nat'l Bank v. Spire*, 223 Neb. 209, 234, 389 N.W.2d 269, 284 (1986), comes closest, but there the court declined to decide whether that state's five-year limitation on the holding of farm and ranch lands, without exception, was pre-empted by 12 U.S.C. § 29 because the question was "too theoretical to determine in a declaratory judgment action at this time." We have been unable to find any decision addressing the precise issue before us.

We are not convinced that there is an "actual conflict" for pre-emption purposes between 12 U.S.C. § 29 and § 10-06-13, N.D.C.C. A state law is not invalid under the

Supremacy Clause merely because it differs from a federal law. *See generally CTS Corp. v. Dynamics Corp. of America*, ___U.S. ___, ___, *107 S.Ct. 1637, 1645-1648, 95 L.Ed.2d 67 (1987)*; *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963); *Pinney Dock and Transport Co. v. Penn. Cent. Corp.*, 838 F.2d 1445, 1480-1482 (6th Cir. 1988); *Rousseff v. Dean Witter & Co., Inc.*, 453 F.Supp. 774, 780-782 N.D.Ind. 1978); L. Tribe, *American Constitutional Law* § 6-26, at p. 491 (2d ed. 1988); *but compare Transamerica Ins. Co. v. Standard Oil Co.*, 325 N.W.2d 210, 213 (N.D. 1982). Rather, the inquiry is whether the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. As we have noted, the primary purpose of each law is the same, *i.e.*, preventing banks and corporations from becoming monopolistic holders of real estate. So too, there is a similar congruity of the secondary goals, *i.e.*, providing a measure of protection to banks and corporations through the respective legislative bodies' reasonable choices of appropriate divestiture periods. Thus, the state law is not repugnant to the purposes and objectives of the federal law. By incorporating the federal proscription against banks holding real estate "in mortmain," state law, in fact, enhances the primary purpose of the federal statute. *See Rousseff v. Dean Witter & Co., Inc., supra*, 453 F.Supp. at 781; *cf. CTS Corp. v. Dynamics Corp. of America, supra.* "[W]here . . . the state law enhances the primary and overall purpose of the federal law, it is not invalid under the Supremacy Clause." *Rousseff v. Dean Witter & Co., Inc., supra*, 453 F.Supp. at 782.

Nor do we believe that § 10-06-13 operates to frustrate Congress' objectives in enacting the recent "housekeeping" amendments to § 29 allowing the Comptroller of the Currency to extend the holding period an additional five years if a good faith attempt has been made to dispose of the property or if it appears disposal would be detrimental to

the bank. The State Legislature, like Congress, has eased the rigidity of the three-year limitation by allowing exemptions. While the exemptions under state law are more narrowly drawn than those allowed by § 29, the Legislature could reasonably determine that the exemptions will provide adequate protection for the banks, and we believe that the state statute as a whole does no violence to the purpose and objectives of the federal statute. We conclude that § 10-06-13, N.D.C.C., is not pre-empted by 12 U.S.C. § 29. Accordingly, the district court erred in determining that the state three-year divestiture requirement was not applicable to Liberty National.

Liberty National contends that if § 10-06-13 is not pre-empted by § 29, state-chartered banks would have a competitive advantage over national banks because state banks are allowed to hold real estate for at least five years under lst 6-03-09, N.D.C.C. *See generally First National Bank v. Dickinson*, 396 U.S. 122, 90 S.Ct. 337, 24 L.Ed.2d 312 (1969), and 7 *Michie on Banks and Banking*, Ch. 15, § 154 (1980), discussing the concept of "competitive equality" in banking activities. We disagree with Liberty National's assertion.

Section 6-03-09, N.D.C.C., provides:

> "*6-03-09. Holding of real estate -- Limitation.* No banking association may hold the possession of any real estate under mortgage, nor title and possession of any real estate purchased to satisfy indebtedness, for a longer period than five years from the date of acquiring title thereto unless such time has been extended by certificate of the commissioner."

National banks are specifically excluded from the definition of a "banking association" for purposes of Title 6. *See* § 6-01-02(1), N.D.C.C.

On their face, both the three-year divestiture period under § 10-06-13 and the five-year divestiture period under

§ 6-03-09 would appear to apply to a state bank's holding of farmland or ranchland. Because of this irreconcilable conflict between the two statutes, Liberty National contends that pursuant to § 1-02-07, N.D.C.C., the special provision, *i.e.*, § 6-03-09, prevails over the general provision, *i.e.*, § 10-06-13. However, we do not believe § 1-02-07, N.D.C.C., helps to resolve this statutory conflict.

The three-year divestiture period under the corporate farming laws is a general provision in the sense that it applies to all "corporations," but it is also a special provision insofar as it applies to divestiture of only "farmland or ranchland." § 10-06-13(5), N.D.C.C. Likewise, § 6-03-09 is a special provision in the sense that it applies to only state "banking associations," but it is also a general provision because it applies to divestiture of "any real estate." We have held that § 1-02-07, N.D.C.C., is inapplicable where the statutory provisions under consideration "are all special and consequently are of the same stature." *Northwestern Savings & Loan Ass'n v. Baumgartner,* 136 N.W.2d 640, 643 (N.D. 1965). We believe § 1-02-07 is equally inapplicable where both provisions are general in nature, or where, as here, the provisions under consideration have both conflicting general and special features. Thus rendering it impossible to determine which provision the Legislature intended to prevail. Under these circumstances, "the subsequent act must prevail." 2A Sands, *Sutherland Statutory Construction,* § 51.03, at p. 469 (4th ed. 1984). *Cf. Northwestern Savings & Loan Ass'n v. Baumgartner, supra;* § 1-02-08, N.D.C.C. Because § 10-06-13 is the more recent enactment, we conclude that state banks are subject to the three-year divestiture period with regard to farmland or ranchland. Thus, national banks are not placed at a competitive disadvantage by their being subject to the three-year divestiture requirement.

Accordingly, the district court summary judgment dismissing the State's complaint is reversed.

Beryl J. Levine
Vernon R. Pederson S.J.
Herbert L. Meschke
H.F. Gierke, III
Ralph J. Erickstad,
Chief Justice

PEDERSON, S. J., sitting in place of VandeWalle, J., disqualified.

STATE OF NORTH DAKOTA	**IN DISTRICT COURT**
COUNTY OF SLOPE	**SOUTHWEST JUDICIAL DISTRICT**
State of North Dakota, Plaintiff, vs Liberty National Bank and Trust Company, a North Dakota Corporation, Defendant,	ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

It appearing to the Court that on the 27th day of July, 1987, hearing was held before this Court upon the Plaintiff's Motion for Summary Judgment as prepared and filed by legal counsel for the Plaintiff, Assistant Attorney General Allen C. Hoberg, Bismarck, N. D., and further that hearing was held upon the Defendant's resistance to said Motion for Summary Judgment by the Plaintiff and the Defendant's independent Motion for Summary Judgment as offered by the Defendant by and through its legal counsel, Attorney Gordon Schnell, Dickinson, N. D.

The Court having considered said oral arguments, together the Briefs of the respective parties and all pleadings of record, does herewith find and determine the following:

UNDISPUTED FACTS

I

That the Defendant herein is a National Bank operating pursuant to a national charter and subject to supervision by the Office of the Comptroller of Currency, United States Government.

That in 1982 and years prior thereto, the Defendant did loan substantial sums of money to one Marvin D. Lutz,

with said loans evidenced by a promissory note dated April 13, 1982, in the principal sum of $151,421.16, and as secured in part by a real estate mortgage to the Defendant upon 320 acres of farm land located in Slope County, N. D., and as described as follows:

The Southwest quarter of the Northwest quarter;
The West half of the Southwest quarter;
The Southeast quarter of the Southwest quarter;
The North half of the North half all in Section 26, Township 134 North, Range 98 West.

III

That in 1983, the said Marvin D. Lutz did default upon said promissory note, and in an effort to avoid foreclosure upon said real estate mortgage, did convey the foregoing described real property to the Defendant herein by Warranty Deed dated September 19, 1983, and that said real property has remained the property of the Defendant from and after the date of conveyance.

IV

That from and after the date of conveyance of said real property to the Defendant herein, said real property has been leased by the Defendant to Farmer/Operators of said real property, and that the same is devoted to agricultural endeavors.

V

That as a result of the foregoing loan by the Defendant to Marvin Lutz, and the subsequent conveyance of said real property from Marvin Lutz to the Defendant in satisfaction of said loan, the Defendant herein did suffer a loss of $44,221.16, as a result of the declining values in real property.

VI

That the Defendant herein has in good faith actively attempted to sell said real property by seeking private bids thereon and by listing the same for sale with a local realtor, but that to the date hereof the highest offer received by the Defendant for purchase of said real property is in the amount of $64,000.00.

VII

That the action brought by the Plaintiff as against the Defendant is pursuant to North Dakota Century Code Section 10-06-13, and seeks to compel the Defendant to comply with the Corporate Farming law of the State of North Dakota or to divest itself of all farm land or ranch land it owns within the State of North Dakota, meaning the foregoing described real property.

VIII

That the Defendant herein has held title to the foregoing described real property for a period exceeding three years.

IX

That the Defendant does not qualify for any express exemptions as set forth in Chapter 10-06 of the North Dakota Century Code.

OPINION

The Plaintiff in prosecuting the above entitled litigation pursuant to the provisions of Chapter 10-06 of the North Dakota Century Code, argues to the Court that the Defendant is a corporation as defined in Chapter 10-06 of the North Dakota Century Code, that there is no exception contained therein which is applicable to said Defendant, and accordingly that the Defendant is bound by the pro-

visions of Section 10-06-13, (2) (4), which provide as follows:

> "2. The divestment period is deemed to be a convenant running with the Title to the land against any corporate grantee, corporate successor, or corporation assignee of the corporation not authorized to do business under this chapter."
>
> "4. Subject to the divestiture requirements of subsections 5, 6 and 7, a domestic or foreign corporation may acquire farm land or ranch land as security to indebtedness, by process of law in the collection of debts, or by any procedure for the enforcement of a lien or claim thereon whether created by mortgage or otherwise"
>
> "5. Unless retention of the farm land or ranch land is permitted under subsection 6 or 7, all farm land or ranch land acquired as security for indebtedness, in the collection of debts, or by the enforcement of a lien or claim shall be disposed of within three years after acquiring ownership, if the acquisition would otherwise violate this chapter."

It is conceded by the Defendant herein that the Defendant does not qualify for the exceptions as set forth in subsections 6 and 7 of Section 10-06-13 of the North Dakota Century Code.

The issue presented before the Court is whether or not the Defendant is subject to the provisions of Chapter 10-06 of the North Dakota Century Code, or has said statutes and its application to the Defendant been preempted by 12 USC Section 29. 12 USC Section 29 clearly provides for the supervision of National Banks by the Office of the Comptroller of Currency, and does expressly provide that National Banks may retain ownership of real property for a period of five years, and may in fact apply to the Comp-

troller of Currency for an extension of time for an additional five year period, therein making a permissible time period of ten years for disposition of real property.

If the Defendant is subject to the provisions of Section 10-05-13 (5) of the North Dakota Century Code, the Defendant would then be compelled to dispose of all real property interests within three years from the date of acquisition of title to the same.

The Plaintiff herein argues that there has been no preemption by the United States Government in the enactment of 12 USC Section 29, in that compliance with said section may occur simultaneously with compliance with Section 10-06-13 subparagraph 5 of the North Dakota Century Code. In otherwords if indeed the Defendant had disposed of said real property within thirty-six months from the date of acquisition of title to the same, the Defendant may have complied with the North Dakota Century Code and the United States Code as applicable. The Plaintiff then continues to argue that since impossibility of compliance does not exist, that there is no conflict between such statutes and accordingly there is no basis to argue preemption by the United States Government.

The Defendant herein argues that there is a fundamental conflict between the provisions of the United States Code and the North Dakota Century Code in that compelling the Defendant to comply with the provisions of the North Dakota Century Code expressly deny to the Defendant the flexibility provided the Defendant by 12 USC Section 29. Accordingly, the Defendant argues that this fundamental conflict impairs the flexibility assured to the Defendant by 12 USC 29, and accordingly that there is a fundamental conflict, and therefore preemption by the United States Government.

This Court finds the decision in *Fidelity Federal Savings and Loan Association v de la Cuesta,* 458 U. S. 140 to be persuasive authority that there does indeed exist in the

case at bar a fundamental conflict between Chapter 10-06 of the North Dakota Century Code and 12 USC Section 29. Therein the United States Supreme Court recognized that the relative importance to the State of its own law is not material when there is a conflict with a valid Federal law. The United States Government by granting to banks with national charters the opportunity to dispose of real property acquired in the ordinary course of their business, has expressly granted to such national banks flexibility within their internal operations and accordingly to suggest that an reduction of that period of time by state statute is not a conflict, is without merit.

It is therefore the Opinion of this Court that there is a fundamental conflict between the provisions of North Dakota Century Code 10-06 and its application to the Defendant herein in the disposition of real property, and the provisions of 12 USC Section 29. It follows therefrom that having determined that a fundamental conflict does exist, that the United States Government has preempted the particular area of retention of real property interests by a nationally chartered bank, and accordingly that the State of North Dakota may not enact legislation which would directly conflict with the provisions of 12 USC Section 29.

It is therefore the decision of this Court that the Defendant herein is entitled to Summary Judgment pursuant to Rule 56 of the North Dakota Rules of Civil Procedure, in that there is no material factual issue existing between the parties hereto, and that the Defendant herein is entitled to Judgment as a matter of law. It is therefore the Order of the Court that legal counsel for the Defendant shall prepare a Judgment of Dismissal in the foregoing litigation, and shall be entitled to statutory costs and allowances.

It is the further Order of the Court that the Defendant's Motion for Attorneys fees as a result of the foregoing litigation is herewith denied.

Dated at Hettinger, N. D. this 3rd day of August, 1987.

BY THE COURT:
/s/ DONALD L. JORGENSEN
DONALD L. JORGENSEN
DISTRICT JUDGE

STATE OF NORTH DAKOTA COUNTY OF SLOPE	IN DISTRICT COURT SOUTHWEST JUDICIAL DISTRICT
State of North Dakota, Plaintiff, -vs- Liberty National Bank and Trust Company, a North Dakota Corporation, Defendant.	NOTICE OF APPEAL Civil No. 1-87

TO: LIBERTY NATIONAL BANK AND TRUST COMPANY and MR. DUANE ANDERSON, ITS PRESIDENT, 115 FIRST AVENUE WEST, DICKINSON, NORTH DAKOTA 58601, and ITS ATTORNEY, GORDON W. SCHNELL, MACKOFF, KELLOGG, KIRBY & KLOSTER, P.C., 46 WEST SECOND STREET, POST OFFICE BOX 1097, DICKINSON, NORTH DAKOTA 58602-1097

PLEASE TAKE NOTICE that the State of North Dakota, in the above-titled action does hereby appeal to the Supreme Court of the State of North Dakota from that judgment of the district court entered in this action on the 24th day of August, 1987.

Dated at Bismarck, North Dakota, this 31st day of August, 1987.

State of North Dakota
Nicholas J. Spaeth
Attorney General
BY: /s/Allen C. Hoberg
Allen C. Hoberg
Assistant Attorney General
Office of Attorney General
State Capitol
Bismarck, North Dakota 58505

Attorneys for the Plaintiff,
State of North Dakota

STATE OF NORTH DAKOTA COUNTY OF SLOPE		IN DISTRICT COURT SOUTHWEST JUDICIAL DISTRICT
State of North Dakota, Plaintiffs, -vs- Liberty National Bank and Trust Company, a North Dakota Corporation, Defendant.	)	Civil No.____ COMPLAINT

Plaintiff, State of North Dakota, for its Complaint against defendant, Liberty National Bank and Trust Company, Dickinson, North Dakota, states and alleges as follows:

I.

Defendant, Liberty National Bank and Trust Company, is a corporation, chartered by the Comptroller of the Currency under authority from the National Bank Act of 1864, 12 U.S.C. 51 *et seq.* 21, 22, 26, and 27, and the Federal Deposit Insurance Act of 1935, 12 U.S.C. §§1814(b) and 1816. It is authorized to do business in the State of North Dakota as a national bank and trust company under the laws of the United States and pursuant to the Comptroller's approval.

II.

Defendant is the owner of a tract of farmland or ranchland located in Slope County, North Dakota, more particularly described as follows:

Twp. 134 N., Rge. 98 W., Sec/ 26: $SW^1/_4NW^1/_4$; $W^1/_2SW^1/_4$; $SE^1/_4SW^1/_4$ and $N^1/_2N^1/_2$, Slope County, North Dakota (320 acres more or less).

III.

The above-described real property is farmland or ranchland within the meaning of N.D.C.C. Ch. 10-06.

IV.

The defendant, Liberty National Bank and Trust Company, was incorporated as a national bank and trust company when it acquired the above-described real property.

V.

Defendant is not a family farm corporation organized pursuant to N.D.C.C. Ch. 10-06, nor a nonprofit organization authorized to hold land pursuant to N.D.C.C. Ch. 10-06. Neither is the defendant owning or leasing farmland or ranchland pursuant to an exception identified in N.D.C.C. Ch. 10-06. It, therefore, is not lawfully owning or leasing farmland or ranchland or engaging in farming or ranching in North Dakota pursuant to N.D.C.C. Ch. 10-06.

VI.

This action is brought pursuant to N.D.C.C. §10-06-13, to force the defendant to comply with the corporate farming law of the State of North Dakota or to divest itself

of all farmland or ranchland it owns within the State of North Dakota.

VII.

North Dakota's anti-corporate farming law originated through an initiated measure approved by the voters on June 29, 1932. Since that date this law has been amended on several occasions, the most recent was during the 1985 Legislative Assembly.

VIII.

N.D.C.C. §10-06-13 allows domestic or foreign corporations to "acquire farmland or ranchland as security for indebtedness, by process of law in the collection debts or by any procedure for the enforcement of a lien or claim thereon, whether created by mortgage or otherwise." This section so requires that "unless retention of the farmland or ranchland is permitted under subsection 6 or 7, all farmland or ranchland acquired as security for indebtedness, in the collection of debts, or by the enforcement of a lien or claim shall be disposed of within three years after acquiring ownership, if the acquisition would otherwise violate this chapter."

IX.

Liberty National Bank and Trust Company acquired ownership of the aforementioned tract of land in Slope County on September 19, 1983, by warranty deed from Marvin D. Lutz and Stella M. Lutz, husband and wife, grantors. Such ownership was acquired within the meaning of N.D.C.C. §10-06-13 "as security for indebtedness, by process of law in the collection of debts, or by any procedure for the enforcement of the lien or claim thereon, whether created by mortgage or otherwise." Such land has been held longer than the three-year statutory period

and retention of such land is not otherwise in accord with the exceptions of N.D.C.C. §10-06-13.

X.

Defendant's ownership and use of the land set forth above is, therefore, in violation of N.D.C.C. Ch. 10-06.

WHEREFORE, plaintiff prays:

1. That the Court issue its order declaring defendant in violation of N.D.C.C. Ch. 10-06;

2. That the Court, after the Attorney General has filed said order in Slope County Court, order defendant to divest itself of all farmland or ranchland which it owns, pursuant to N.D.C.C. §10-06-13(1).

3. That if the defendant fails to comply with Court's order pursuant to N.D.C.C. §10-06-13(1), the Court order the defendant to be dissolved by the Secretary of State or to cease doing business in North Dakota, or take such other and further action as may be fair, just, and equitable.

DATED this 9th day of February, 1987.

State of North Dakota
Nicholas J. Spaeth
Attorney General

By: /s/Allen C. Hoberg
Allen C. Hoberg
Assistant Attorney General
Office of Attorney General
State Capitol
Bismarck, ND 58505

Attorneys for Plaintiff

STATE OF NORTH DAKOTA	IN DISTRICT COURT
COUNTY OF SLOPE	SOUTHWEST JUDICIAL DISTRICT
State of North Dakota, Plaintiff, -vs- Liberty National Bank and Trust Company, a North Dakota corporation, Defendant.	ANSWER Civil No. ____

COMES NOW the Defendant, Liberty National Bank and Trust Company ("Liberty"), by and through its attorneys, Mackoff, Kellogg, Kirby & Kloster, P.C., and for its Answer to the Plaintiffs' Complaint in the above action, states and alleges as follows:

GENERAL DENIAL

I.

Liberty denies each and every allegation and thing contained in the Complaint of Plaintiff, State of North Dakota, except as hereinafter specifically admitted, qualified, modified, or explained.

RESPONSE TO PLAINTIFF'S CLAIM FOR RELIEF

II.

Liberty admits the allegations contained in Paragraphs I, II, III, and IV of the Plaintiff's Complaint, except that with respect to Paragraphs I and IV thereof Liberty alleges that it is a national banking association rather than a corporation.

III.

With respect to the allegations contained in Paragraph V of the Plaintiff's Complaint, Liberty admits that it is not a family farm corporation organized pursuant to N.D.C.C. Ch. 10-06, nor a non-profit organization authorized to hold land pursuant to N.D.C.C. Ch. 10-06 and Liberty admits that it is not owning or leasing farmland or ranchland pursuant to an exception identified in N.D.C.C. Ch. 10-06. With respect to the allegations in said Paragraph concerning lawfully owning or leasing farmland or ranchland, Liberty admits that it is not doing so pursuant to N.D.C.C. Ch. 10-06, but alleges that Ch. 10-06 is not applicable to Liberty, as hereinafter set forth.

IV.

Liberty admits the allegations of Paragraphs VI and VII of the Plaintiff's Complaint.

V.

Liberty admits the allegations contained in Paragraph VIII of the Plaintiff's Complaint, but specifically denies that N.D.C.C. Ch. 10-06 is applicable to Liberty, as hereinafter set forth.

VI.

Liberty admits the allegations of Paragraph IX of the Plaintiff's Complaint, but specifically denies that the three-year statutory period set forth in N.D.C.C. §10-06-13 is applicable to Liberty, as hereinafter set forth.

VII.

Liberty admits the allegations of Paragraph X of the Plaintiff's Complaint, but alleges that N.D.C.C. Ch. 10-06 is not applicable to Liberty, as hereinafter set forth.

AFFIRMATIVE DEFENSES

VIII.

That N.D.C.C. Ch. 10-06 does not apply and was not meant to apply to national banking associations such as Liberty.

IX.

That N.D.C.C. Ch. 10-06 is pre-empted and is inapplicable to Liberty by virtue of 12 U.S.C. §29 (Supp. 1986).

X.

That N.D.C.C. Ch. 10-06 is inapplicable to North Dakota banks by virtue of N.D.C.C. §6-03-09.

XI.

The Complaint fails to state a claim upon which relief can be granted.

XII.

The Plaintiff knows or should know that North Dakota's corporate farming law is pre-empted with respect to banks by federal law, and therefore, the Plaintiff's claim is frivolous in nature and without merit, and consequently Liberty is entitled to its costs and attorney's fees in defense of this action pursuant to §28-26-01(2) and §28-26-31, N.D.C.C.

WHEREFORE, Defendant, Liberty, prays for judgment and relief as follows:

1. that the Plaintiff's Complaint and all things therein be dismissed with prejudice and on the merits;

2. for costs, disbursements, and reasonable attorney's fees pursuant to §28-26-01(2) and §28-26-31, N.D.C.C.; and

3. for such other equitable and further relief as to the Court seems just and equitable.

Dated this 18th day of March, 1987.

MACKOFF, KELLOGG, KIRBY & KLOSTER, P.C.
Attorneys for the Defendant
Office and Post Office Address:
46 West Second Street, P. O. Box 1097
Dickinson, North Dakota 58602-1097

By: Gordon W. Schnell
Gordon W. Schnell, Attorney

CERTIFICATE OF SERVICE

I hereby certify that I caused for a true and correct copy of the foregoing ANSWER to be mailed, by first class mail with postage duly prepaid, on the 18th day of March, 1987, to the following person:

Allen Hoberg
Assistant Attorney General
State of North Dakota
State Capitol
Bismarck, North Dakota 58505

Gordon W. Schnell, Attorney

STATE OF NORTH DAKOTA	IN DISTRICT COURT
COUNTY OF SLOPE	SOUTHWEST JUDICIAL DISTRICT
State of North Dakota, Plaintiff, -vs- Liberty National Bank and Trust Company, a North Dakota corporation, Defendant.	Civil No. 1-87 MOTION FOR JUDGMENT ON THE PLEADINGS OR FOR SUMMARY JUDGMENT

TO: THE HONORABLE DONALD L. JORGENSEN, JUDGE OF THE SLOPE COUNTY DISTRICT COURT:

The plaintiff, State of North Dakota, in the above-titled action, by and through its Attorney General, Nicholas J. Spaeth, and his Assistant Attorney General, Allen C. Hoberg, does hereby move this court for a Motion for Judgment on the Pleadings or for Summary Judgment in its favor on the grounds that there are no genuine issues as to any material fact based on the pleadings of the parties and that plaintiff is entitled to judgment as a matter of law. Further, the plaintiff moves for a judgment in its favor on the grounds that the defendant is in violation of N.D.C.C. Ch. 10-06. The defendant is a corporation within the meaning of N.D.C.C. Ch. 10-06. N.D.C.C. Ch. 10-06, and specifically N.D.C.C. §10-06-13, is applicable to the defendant and is meant to apply to national banking associations.

The plaintiff submits this Motion pursuant to Rule 12(c) and Rule 56 of the North Dakota Rules of Civil Procedure

and Rule 3.2(c) of the North Dakota Rules of Court. The plaintiff does not request the taking of testimony or the taking of oral argument so no hearing date has been set.

This Motion is based upon plaintiff's Brief in Support of the Motion for Judgment on the Pleadings or Summary Judgment, and in all other pleadings, papers, and records on file in this action.

Dated at Bismarck, North Dakota, this 11th day of May, 1987.

State of North Dakota
Nicholas J. Spaeth
Attorney General

By: /s/Allen C. Hoberg
Allen C. Hobert
Assistant Attorney General
Office of Attorney General
State Capitol
Bismarck, ND 58505

Attorneys for the Plaintiff

STATE OF NORTH DAKOTA	IN DISTRICT COURT
COUNTY OF SLOPE	SOUTHWEST JUDICIAL DISTRICT
State of North Dakota, Plaintiff, -vs- Liberty National Bank and Trust Company, a North Dakota corporation, Defendant.	DEFENDANT'S RETURN AND MOTION FOR SUMMARY JUDGMENT Civil No. 1-87

The Defendant, Liberty National Bank and Trust Company, by and through its Attorneys, does hereby resist the Plaintiff's Motion for Judgment on the Pleadings or for Summary Judgment herein, upon the grounds that the three year limit specified in subsection 5 of Section 10-06-13 NDCC is preempted by the five year provision contained in 12 USC §29, and that by virtue thereof and the other reasons set forth in the Answer herein, the Plaintiff's Complaint fails to state a claim upon which relief can be granted.

The Defendant does further move the Court for Summary Judgment in its favor dismissing the Plaintiff's claim in this action pursuant to Rule 56(b) of the North Dakota Rules of Civil Procedure, upon the grounds that there is no genuine issue as to any material fact, and that the Defendant Liberty National Bank and Trust Company is entitled to judgment dismissing the Plaintiff's claim as a matter of law.

This Motion and Return are based upon all of the pleadings, records, and files herein, and upon the Affidavits of Duane Anderson and Arthur Gatzke filed herewith; to-

gether with the Defendant's Brief in support hereof and the letter brief from the Chief Counsel of the United States Comptroller of the Currency submitted herewith.

The Defendant further prays that it be awarded its costs and disbursements herein, including Motion costs.

The Defendant requests that oral arguments be held.

Dated this 12th day of June, 1987.

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KLOSTER, P.C.
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Attorneys for the Defendant
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By: /s/Gordon W. Schnell, Attorney

By: /s/Mary E. Maichel,
Mary E. Maichel, Attorney

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

File No. 870256

State of North Dakota, Plaintiff and Appellant

v.

Liberty National Bank and Trust Company, a North Dakota Corporation, Defendant and Appellee

The original and seven copies of a Motion to Extend Stay of Mandate were filed August 15, 1988, in the above-entitled case.

ORDERED, that an extension of the Stay of Mandate is granted to September 26, 1988, under the provisions of Rule 41(b) of the North Dakota Rules of Appellate Procedure.

The Supreme Court of the State of North Dakota convened at 1:30 p.m. this 16th day of August, 1988, with the Chief Justice, the Honorable Ralph J. Erickstad, acting as Administrative Justice pursuant to the provisions of Administrative Rule 11, and the Deputy Clerk of the Supreme Court, Penny Barry, being present and directed the entry of the above order.

/s/Penny Barry
Penny Barry
Deputy Clerk
North Dakota Supreme Court

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

JUDGMENT

File No. 870256

Appeal from the District Court of Slope County.

State of North Dakota,
Plaintiff and Appellant

v.

Liberty National Bank and
Trust Company, a North Dakota Corporation,
Defendant and Appellee

This appeal having been heard by the Court at the January, 1988, term before:

The Honorable Ralph J. Erickstad, Chief Justice; the Honorable H.F. Gierke III, the Honorable Herbert L. Meschke, the Honorable Beryl J. Levine, the Honorable Vernon R. Pederson, Surrogate Judge, Justices;

and the Court having considered the appeal, it is ORDERED AND ADJUDGED that the summary judgment of the court below be and the same is hereby REVERSED.

It is further ordered and adjudged that Appellant have and recover from Appellee costs and disbursements on this appeal, to be taxed and allowed in the court below.

Dated: June 28, 1988.

By the Court:

/s/ Ralph J. Erickstad
Chief Justice
North Dakota Supreme Court

Attest: /s/ Luella Dunn
Clerk of the Supreme Court

Seal

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

File No. 870256

State of North Dakota,
Plaintiff and Appellant

v.

Liberty National Bank and
Trust Company, a North Dakota Corporation,
Defendant and Appellee

The original and seven copies of a Motion to Stay Mandate were filed July 18, 1988, in the above-entitled case.

ORDERED, that a 30-day Stay of Mandate is granted under the provisions of Rule 41(b) of the North Dakota Rules of Appellate Procedure.

Entered this 18th day of July, 1988, under the provisions of Administrative Rule 5.

/s/ Luella Dunn
Luella Dunn
Clerk
North Dakota Supreme Court

Supreme Court, U.S.
FILED
OCT 28 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-516

In The

Supreme Court of the United States

October Term, 1988

LIBERTY NATIONAL BANK AND TRUST COMPANY,

Petitioner,

v.

STATE OF NORTH DAKOTA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a national bank is subject to a state law which generally prohibits ownership of farm and ranch land by all corporations and which provides a somewhat shorter period than federal banking law for divestiture of land acquired by a corporation as security for indebtedness, in collection of debts, or by the enforcement of a lien or claim.

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No. 88-516

In The

Supreme Court of the United States

October Term, 1988

LIBERTY NATIONAL BANK AND TRUST COMPANY,

Petitioner,

v.

STATE OF NORTH DAKOTA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

North Dakota Century Code ch. 10-06 is North Dakota's corporate farming law, sometimes called an anti-corporate farming law. It originated through an initiated measure and was approved by the voters on June 29, 1932. Since that date, this law has been amended on several occasions. During the 1981 Legislative Session, a blanket prohibition on corporate farming in North Dakota was changed to allow limited corporate farming

under specified exemptions such as the exemption for family farm corporations.

N.D.C.C. § 10-06-01 provides that "[a]ll corporations, except as otherwise provided in this chapter, are prohibited from owning or leasing land used for farming or ranching and from engaging in the business of farming or ranching." N.D.C.C. ch. 10-06 goes on to provide various exceptions to this basic rule. One exception, found in N.D.C.C. § 10-06-13, states: "a domestic or foreign corporation may acquire farmland or ranchland as security for indebtedness, by process of law in the collection of debts, or by any procedure for the enforcement of a lien or claim thereon, whether created by mortgage or otherwise." N.D.C.C. § 10-06-13(4). This section further states that such land acquired pursuant to subsection 4 "shall be disposed of within three years after acquiring ownership, if the acquisition would otherwise violate this chapter." N.D.C.C. § 10-06-13(5).

The Attorney General for the State of North Dakota brought this action to N.D.C.C. § 10-06-13 to force the petitioner, Liberty National Bank and Trust Company, a national banking association (hereinafter referred to as "bank" or "Liberty National Bank"), to comply with the corporate law of the State of North Dakota by divesting itself of the farmland or ranchland it owned within the State of North Dakota in violation of N.D.C.C. ch. 10-06.

The North Dakota district court granted the bank's motion for summary judgment on August 3, 1987. The State appealed to the North Dakota Supreme Court on August 31, 1987. In a decision filed June 28, 1988, the North Dakota Supreme Court reversed the district court's decision granting summary judgment in favor of the petitioner.

At the commencement of this litigation, Liberty National Bank was the owner of a tract of farmland or ranch land (as "owner" is defined by N.D.C.C. ch. 10-06). It had acquired ownership of this tract of land on December 19, 1983, by warranty deed from Marvin D. Lutz and Stella M. Lutz.

The deed was apparently given to the bank by the Lutzes in order to avoid foreclosure of a mortgage. The bank leased the land to the Lutzes in 1985 and 1986 with an option to purchase. After the Lutzes advised the bank that they no longer had any interest in purchasing the property, the bank attempted to sell the property to others. The bank experienced difficulty in selling the property because neighbors of an adjacent landowner who had expressed interest in the property were reluctant to bid against the landowner. Subsequently, the land was sold to an investor from Washington, D.C.

SUMMARY OF ARGUMENT

This is not an appropriate case for review upon writ of certiorari because (1) this case does not present any important question of federal law, (2) the decision of the North Dakota Supreme Court is not in conflict with any decision of another state court of last resort or of any federal court of appeals, and (3) the decision below is consistent with this court's case law on federal preemption.

The State of North Dakota seeks to impose the requirements of its general corporate law on national banks which do business within the state. The particular

statute enforced, that prohibiting most corporate ownership of farm and ranch land, is one common to only a limited number of states in the Midwest and, consequently, a decision in this case would have little, if any, impact nationwide. Moreover, both state and federal statutes have similar purposes and differ slightly only in the means chosen to implement those purposes. Consequently, the case presents no important question of federal law.

As the North Dakota Supreme Court noted in its opinion, no other decisions on the issues presented in this case have been handed down by any state court of last resort and any federal court of appeals. Thus, there is no conflict in decisional law for this court to resolve.

Finally, the decision in the North Dakota Supreme Court is consistent with other case law permitting states to apply to national banks operating within their jurisdiction state law generally applicable to all persons and businesses. Thus, there exist no special or important reasons why this court should grant certiorari in this case.

ARGUMENT

Petitioner has failed in his petition to set out special and important reasons why this court should grant a writ of certiorari in this case. To the contrary, there are several substantial reasons why the petition must be denied.

I. THIS CASE PRESENTS ISSUES NARROW IN SCOPE AND OF LIMITED NATIONAL SIGNIFICANCE.

Since passage of the National Bank Act of 1864, a dual system of banking regulation has arisen in this country. On the one hand, there are state-chartered banks, which are creatures of individual state law and regulated by their respective state banking authorities. On the other hand, there are national banks, which are instrumentalities of the federal government and regulated by federal agencies, including the Comptroller of the Currency and the Federal Deposit Insurance Corporation.

For the most part, state-chartered banks must look to the law of the state in which they have their charter for the boundaries of permissible conduct. By contrast, national banks generally must look to federal statutes and regulations for what they may or may not do in the conduct of their banking operations. Nonetheless, state banks remain subject to general federal law affecting their operations and federal banks remain subject to state laws of general applicability.

For example, a state bank whose deposits are insured by the FDIC must follow applicable rules and regulations promulgated by the Corporation. So, too, are state banks subject to federal tax laws, occupational safety laws, employment security laws, as well as other federal laws. Their state charter, while freeing state banks from the requirements of the National Bank Act and other national banking laws, does not shield them from the other federal

legal obligations and duties that all commercial enterprises conducting operations within our nation's borders face as well.

Likewise, national banks, while unencumbered by state laws governing the conduct of banking operations within the state, are not shielded by virtue of their federal charter from complying with those state laws which are generally applicable to all persons and businesses conducting activities within the state. For example, a national bank can be compelled to pay a state tax on bank stock. *National Bank v. Commonwealth*, 9 Wall. 353 (1869). Similarly, a national bank is subject to state law regarding fraudulent conveyances. *McClellan v. Chipman*, 164 U.S. 347 (1896). In *McClellan*, the court acknowledged that although requiring a national bank to obey state laws of general applicability may impair the freedom of that bank to operate as it pleases, only those state laws which frustrate the Congress's purpose or impair the efficiency of a bank to discharge the duties imposed upon it by federal law would be subject to preemption. *Id.*

This case does not present substantial questions which go to the heart of the differences between these two parallel systems. Rather, it involves relatively minor gradations of difference in the choice of the means to implement essentially identical legislative objectives.

Petitioner asserts that the decision by the North Dakota Supreme Court "nullified" 12 U.S.C. § 29 in pursuit of the purposes and objectives of the North Dakota corporate farming statute. Petitioner also contends that such nullification presents a grave threat to the economic

viability of national banks. However, reports of the nullification of federal law and threats to the national banking system are greatly exaggerated.

Far from "nullifying" the federal statute, the North Dakota Supreme Court decision in this case merely carves out a very narrow area where the full sweep of the federal statute is limited by a slightly more restrictive state law provision of general applicability. The North Dakota Supreme Court reasoned that, in light of the essential congruity of the purposes and objectives of the two laws, permitting this slight limitation did "no violence to the purpose and objectives of the federal statute." *State of North Dakota v. Liberty National Bank*, 427 N.W.2d 307, 315 (N.D. 1988).

The decision left wholly unaffected the application of 12 U.S.C. § 29 to commercial and residential real property acquired by national banks. Neither is the effect of the decision on bank ownership of farm and ranch real property significantly different from the result under 12 U.S.C. § 29. The initial divestiture period is not eliminated entirely, but merely shortened from five to three years. Similarly, the provisions for extending the initial divestiture period are not eliminated, but rather more narrowly drawn, with consideration being given to the interests of the State of North Dakota as well as those of the bank.

Neither are the issues presented in this case of great national significance. State corporate farming statutes prohibiting or restricting corporate ownership of farm and ranch land exist in only a handful of states in the

Midwest.[1] There is no evidence of any national trend toward expanding this small group. Such expansion is unlikely for a number of reasons. States where these laws have been enacted are generally states with histories of agrarian, populist political activity. For the most part, states without laws restricting corporate farming are predominately urban. By reason of sheer numbers, the political influence of the family farm constituency in these states is substantially less than it is in the Midwestern states.

Moreover, these same urban states, because they currently permit corporate farming, are likely to have well-established, well-financed, and politically powerful constituencies currently involved in corporate farming and possessing a vested interest in the status quo.

Because the North Dakota Supreme Court's holding permits only minor differences in implementing essentially similar state and federal legislative objectives and because any impact of this decision is limited to states in a single geographic region, this case is not one that is appropriate for review upon writ of certiorari.

---

[1] The following states have restrictions on corporate ownership of farm and ranch land: Iowa, Kansas, Minnesota, Missouri, Nebraska, North Dakota, Oklahoma, South Dakota, and Wisconsin.

II. THE DECISION OF THE NORTH DAKOTA SUPREME COURT DOES NOT DIRECTLY CONFLICT WITH ANY DECISION OF THIS COURT, ANY FEDERAL COURT OF APPEALS, OR ANY STATE COURT OF LAST RESORT.

This case does not offer any opportunity to resolve differences in decisions by any courts. Factually, this appears to be a case of first impression. Respondent's research in this regard reveals no cases where a federal court of appeals or a state court of last resort has ruled on issues similar to those presented here.

The closest case appears to be *Omaha Nat. Bank v. Spire*, 389 N.W.2d 269 (Neb. 1986). There a national bank brought a declaratory judgment action against the attorney general of the state of Nebraska seeking a declaration that the state's corporate farming law did not apply to national banks on the ground that the state law conflicted with 12 U.S.C. § 29. In that case, the court declined to decide whether Nebraska's five-year limitation on the holding of farm and ranch lands, without exception, was preempted by 12 U.S.C. § 29 because the question was "too theoretical to determine in a declaratory judgment action at this time." *Omaha Nat. Bank*, 389 N.W.2d at 284.

Neither does petitioner's brief cite any case where another court has even addressed the issue of the applicability of state corporate farming legislation to national banks. Much less does it cite any case where a federal court of appeals or other state court of last resort has expressed any view of the law in direct conflict with the decision by the North Dakota Supreme Court in this case.

The North Dakota Supreme Court noted in its decision the absence of any "on point" precedent saying,

"[w]e have been unable to find *any* decision addressing the precise issue before us." *Liberty Nat. Bank*, 427 N.W.2d at 314 (emphasis supplied).

Lacking case law on the issue of the application of corporate farming laws to national banks, petitioner argues by analogy this court's decision in *Fidelity Federal Savings and Loan Assoc. v. de la Cuesta*, 458 U.S. 141 (1982), to press its argument for certiorari. But, in addition to being distinguishable on its facts, *Fidelity* is clearly distinguishable from the instant case on the basis of the law applied. *Fidelity* was a case of express federal preemption articulated not by Congress, but by the Federal Home Loan Bank Board acting within a proper delegation of authority from Congress. *Fidelity* stands for the limited proposition that a federal agency in the reasonable exercise of authority given it by Congress may act to expressly preempt state law. *Fidelity*, 458 U.S. at 170. Since neither Congress nor the Comptroller of the Currency have expressed any intent to preempt state and corporate farming legislation, it is difficult to see how *Fidelity* can provide much guidance in the determination of this case.

III. THE DECISION OF THE NORTH DAKOTA SUPREME COURT FOLLOWS THIS COURT'S TEACHINGS ON FEDERAL PREEMPTION.

As pointed out by the North Dakota Supreme Court, federal preemption of state law can occur in three different ways: express preemption, intent to preempt implied by the pervasive nature of the federal regulatory scheme, or actual conflict between state and federal law. *Liberty Nat. Bank*, 427 N.W.2d at 309.

The record reflects no expression by Congress or the appropriate administrative agencies of any intent to pre-

empt the state corporate farming laws. For this reason, petitioner is left to argue both implied preemption and actual conflict. Petitioner is wrong as to both of these issues.

A. The Federal Regulatory Scheme is Not so Comprehensive or Pervasive as to Compel an Interference of Congressional Intent to Preempt State Corporate Farming Laws.

While it is true, as petitioner observes, that the National Bank Act does provide a comprehensive system for establishing national banks and governing their day-to-day conduct of banking business, neither the federal banking law nor any other federal law purports to regulate comprehensively, or otherwise, corporate ownership of farm and ranch land. Moreover, it is openly admitted by petitioner that, notwithstanding this comprehensive federal bank regulatory system, national banks remain subject to state law generally applicable to all persons and businesses.

Without doubt, any effort by the State of North Dakota to dictate standards for the extension of credit by national banks, for example, would fail. Likewise, a state law setting minimum capital requirements or check-cashing policies or loan loss amortization rules for national banks would also fail because such matters fall squarely within the system of federal regulation of national banks. However, state laws governing the ownership of farm and ranch land by all corporations, banking and non-banking alike, are different. Although those state laws do affect national banks in a limited way, the laws are not part of any system of federal banking regulation, but rather part of the state's general regulation of

agricultural activity pursuant to its police power. The federal government has no comparable system regulating ownership of farm and ranch land, comprehensive or otherwise. In that, corporate farming laws are not unlike the state regulation of fradulent conveyances approved by the court in *McClellan*.

B. There is No Conflict Between the Divestiture Requirement of North Dakota's Corporate Farming Law and the Restrictions on the Power of a National Bank to Hold Real Property.

As the court below correctly noted, there is no actual conflict for preemption purposes between 12 U.S.C. § 29 and North Dakota Century Code § 10-06-13. *Liberty Nat. Bank*, 427 N.W.2d at 314. Indeed, when one compares the federal and North Dakota systems respecting ownership of real property by national and state banks, one is struck by their similarity, not their differences. As to commercial and residential real property, both systems are the same. As in 12 U.S.C. § 29, N.D.C.C. § 6-03-09 provides for a maximum holding period of five years with discretionary extension by the appropriate regulatory authority. In the case of North Dakota, that authority is the Banking Commissioner.

The only difference between the state and federal laws is in the limited area of farm and ranch real estate. There, North Dakota law provides for an initial three-year divestiture period for property acquired through foreclosure or other security or debt satisfaction transactions while 12 U.S.C. § 29 calls for an initial five-year divestiture period. Similarly, North Dakota's corporate

farming law provisions for extending the initial divestiture period are more narrowly drawn than the corresponding federal banking law provisions. It is not physically impossible for a national bank to comply with both statutes. Divestiture within three years of acquisition complies with both statutes. Surely, the Comptroller would approve an extension of the divestiture period where the national bank had entered into a lease with option to purchase with the prior mortgagor thereby extending both time frames and permitting compliance with both state and federal law. And, of course, a timely contract of sale with the prior mortgagor would also satisfy the requirements of both statutes.

Because compliance with both statutes is physically possible, the search for actual conflict between these statutes must focus on whether or not the small differences embodied in the state statute stand as an obstacle to the purposes and objectives of Congress as embodied in the federal banking statute. *Hines v. Davidowitz*, 312 U.S. 52 (1941).

But what kind of obstacle is sufficient to rise to the level of an actual conflict mandating preemption? State law is not preempted merely because it differs from a federal law. *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963).

Rather, the differences must be of sufficient magnitude to support a finding of congressional intent to preempt the state law, notwithstanding the failure of Congress to directly express such an intent. Such a conclusion follows inevitably from the rule that preemption is not lightly to be presumed. *California Federal S & L Assn. v. Guerra*, 479 U.S. 272, 281 (1987). Thus, Congress

could not have intended any obstacle, however insignificant, unimportant, or indirect, would support a finding of preemption.

For the reasons articulated by the North Dakota Supreme Court, N.D.C.C. ch. 10-06 does not constitute an obstacle to the purposes and objectives sufficient to warrant preemption. Petitioner's argument that the decision by the North Dakota Supreme Court nullifies 12 U.S.C. § 29 is too broad. As indicated *supra*, 12 U.S.C. § 29 as it applies to national bank activities remains largely intact and unaffected by anything contained in N.D.C.C. ch. 10-06.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

Dated this 28th day of October, 1988.

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FILED
OCT 26 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-516

In The

Supreme Court of the United States

October Term, 1988

LIBERTY NATIONAL BANK AND TRUST COMPANY,

Petitioner,

v.

STATE OF NORTH DAKOTA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of North Dakota

BRIEF OF THE AMICUS CURIAE NORTH DAKOTA BANKERS ASSOCIATION IN SUPPORT OF THE PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the court below correctly decided that 12 U.S.C. §29, the provision of the National Bank Act of 1864, 12 U.S.C. §§21 et seq., which establishes the allowable period for national banks to hold real estate acquired in satisfaction of debts previously contracted, does not pre-empt provisions of the North Dakota corporate farming law, N.D. Cent. Code ch. 10-06, which establish a different holding period for national banks in North Dakota with respect to ranchland and farmland acquired in satisfaction of debts previously contracted.

2. Whether this case satisfies the "capable of repetition, yet evading review" standard, and therefore may be accepted by this Court for resolution on the merits.

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No. 88-516

In The

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LIBERTY NATIONAL BANK AND TRUST COMPANY,

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v.

STATE OF NORTH DAKOTA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of North Dakota

BRIEF OF THE AMICUS CURIAE NORTH DAKOTA BANKERS ASSOCIATION IN SUPPORT OF THE PETITIONER

INTEREST OF THE AMICUS CURIAE

The North Dakota Bankers Association respectfully submits this brief as *amicus curiae* to urge the Court to grant the petition for a writ of certiorari to review a decision of the Supreme Court of the State of North Dakota. In that decision, the court reversed an order of the North Dakota district court dismissing the divestiture

action by the State of North Dakota against Liberty National Bank and Trust Company.

The North Dakota Bankers Association is the principal trade association of the commercial banking industry in North Dakota, representing 155 out of the 160 commercial banks in the state. NDBA member banks are located in all counties with commercial banks in the state of North Dakota and include banks chartered by the Comptroller of the Currency ("national banks") and those chartered by the State Banking Board. The Liberty National Bank & Trust Company is a member of the North Dakota Bankers Association. The North Dakota Bankers Association occasionally appears in litigation affecting the interests of the banking community as a whole.

Commercial banks are extensively involved in lending to residents and business and agriculture enterprises in the state of North Dakota. In addition to direct loans for agricultural purposes for purchase of real estate, purchase of livestock, and production of crops and other farm products, banks participate with other lenders, including agencies of the U.S. Government, in making further loans. Should the state of North Dakota prevail in this appeal, there will be an effect on those North Dakota banks holding farmland by virtue of foreclosure or deed in lieu of foreclosure. This will result in a definite effect on the lending practices of every bank. Just what form or magnitude this would be is unknown at this time, but could include a tightening of credit or an increase in the cost of credit. Longer range, the potential effect on state

regulation of national banks, rather than by the Comptroller of the Currency, is a threat to the dual banking system.

Participation in this action by the industry most directly affected by determination of the issues raised by the Petitioner can provide the court with a broader perspective than that which will be provided by the parties to the litigation. Accordingly, the North Dakota Bankers Association, with the consent of the parties, filed herewith, respectfully submits this brief as *amicus curiae* in order to represent the interests of its members.

SUMMARY OF ARGUMENT

The reasons for granting a writ of certiorari in this case are well set forth in the Petition. The decision of the North Dakota Supreme Court appears to ignore decisions of this Court and those of other courts regarding pre-emption of state law to the extent that it actually conflicts with federal law. The North Dakota Court appears to have wanted to reach a desired result – upholding state law as paramount – and disregarded case law in actually reaching that result. This pre-emption question should be decided by this Court; the decision below has the potential to reach far beyond the facts of this case.

ARGUMENT

The primary issue in this case concerns an apparent conflict between Section 10-06-13(5) of the North Dakota

Century Code and 12 U.S.C. §29. This conflict raises the question of which of these statutes applies to a national bank in North Dakota. The answer to this question will decide the case.

N.D.C.C. 10-06-13(5) is part of North Dakota's corporate farming law, more appropriately called an anti-corporate farming law, and provides:

> "Unless retention of the farmland or ranchland is permitted under subsection 6 or 7, all farmland or ranchland acquired as security for indebtedness, in the collection of debts, or by the enforcement of a lien or claim shall be disposed of within three years after acquiring ownership, if the acquisition would otherwise violate this chapter."

The part of the National Bank Act relied on by the Petitioner (hereinafter "the Bank") is set out in 12 U.S.C. §29:

> . . .
>
> "But no such association shall hold the possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it, for a longer period than five years except as otherwise provided in this section.
>
> "For real estate in the possession of a national banking association upon application by the association, the Comptroller of the Currency may approve the possession of any such real estate by such association for a period longer than five years, but not to exceed an additional five years, if (1) the association has made a good faith attempt to dispose of the real estate within the five-year period or (2) disposal within the five-year period would be detrimental to the association. . . ."

In determining which of these laws applies, it is necessary to go back to the source of power for the U.S.

Government and Congress, the United States Constitution. Article VI, clause 2, commonly called the "supremacy clause", provides:

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof and all treaties made or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

12 U.S.C. §29 and N.D.C.C. 10-06-13(5) must be looked at in this context.

Congress passed the National Bank Act in 1864, many years before the 1932 initiated measure prohibiting corporation farming and holding of farmland in North Dakota. This shows that Congress has long been concerned about national banks holding real estate. The State of North Dakota has expressed similar concerns, found in N.D.C.C. 6-03-9, the predecessor of which was passed by the first North Dakota Legislative Assembly in 1890. This statute is similar to 12 U.S.C. §29, but originally provided for a holding period of 10 years. 1890 N.D. Sess. Laws, Ch. 23, §5. After vacillating between 10 and five years, the current five-year holding period was adopted. 1905 N.D. Sess. Laws, Ch. 165, §6. The provision for extension of that five years on approval of the State Examiner (now State Banking Commissioner) was added in 1931. 1931 N.D. Sess. Laws, Ch. 96, §15.

But, these banking laws restrict the holding period for real estate for entirely different reasons than the corporate farming law:

> "The purpose of the provisions of Title 12 U.S.C.A. §29 is to prevent speculation in real estate by banks. To permit a bank to deal indiscriminately in real estate as investments, tying up the capital of the bank, might prevent the meeting by the bank of its primary duty to its depositors."

Exchange Bank of Commerce v. Meadors, 184 P.2d 458, 463 (Okla. 1947). The court in *Central National Bank v. Fleetwood Realty Corporation,* 441 N.E.2d 1244 (Ill. App. 1982), at page 1250, was more specific:

> "The limitation on the power of national banks to invest in real estate contained in section 29 was designed to protect bank depositors and stockholders from risky investments."

The North Dakota Supreme Court has also indicated that these types of statutes were intended primarily for the protection of depositors. *Smith v. Rennix,* 204 N.W. 843 (N.D. 1925). *Jarski v. Farmers & Merchants State Bank of Hankinson,* 206 N.W. 773 (N.D. 1925).

Conversely, North Dakota's corporate farming law was not passed because of concern with protecting depositors of banks. Rather, it was an attempt to prevent corporate entities from outside of North Dakota from holding large quantities of North Dakota farmland. McElroy, *North Dakota's Anti-Corporate Farming Act,* 36 N.D.L.Rev. 96 (1960).

It is obvious there is a conflict between the national bank real estate law (12 U.S.C. §29) and the North Dakota anti-corporate farming law (N.D.C.C. 10-06-13(5)), both as to the letter and purpose of the laws. The Respondent (hereinafter "the State") even agreed with this in it's brief below. Where the State does not agree, and it is wrong, is

which law controls in this case. The State contends, and the North Dakota Supreme Court so ruled, that the North Dakota corporate farming law controls and is not preempted by the National Bank Act.

This Court has held that even if Congress has not entirely displaced state regulation over the matter in question, state law is preempted to the extent it actually conflicts with federal law, when it is impossible to comply with both state and federal law or where state law stands as an obstacle to accomplishment of the full purposes and objectives of Congress. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984). *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963). In discussing the latter case, the State indicated below that there is a possibility of complying with both North Dakota law and federal law, just as the Florida Avocado Growers could comply with both state and federal law. In the instant case, we are talking about banks and real estate, not avocados; there is a difference! Sure, there is the possibility of complying with both laws, to the complete frustration of the federal law. This is different than marketing avocados.

It is obvious that Congress has not entirely displaced state regulation over national banks; that is not necessary. But, Congress has spoken and acted on many subjects governing national banks, through the National Bank Act and other statutes. These statutes have been further implemented by the Comptroller of the Currency, the designated regulator for national banks. When Congress has spoken on the subject, and state law conflicts with what Congress passed, federal law will control.

In this case, the state law does stand as an obstacle to accomplishment of the full purposes and objectives of Congress, as stated in *Central National Bank, supra*. Protection of depositors may necessitate holding foreclosed real estate for more than three years. Maybe this is why both federal and state banking laws allow for five years, with the possibility of extension in certain situations. What if there is no market for the land or a forced divestiture of the land would be detrimental to the depositors? The bank regulators are better qualified to determine this than the North Dakota Attorney General.

The State's brief below dwelled on a number of cases where various courts have held that federal law did not preempt state law as applied to national banks. These cases, and several others, are easy to distinguish from the case at hand. Some examples are:

* *In re Certain Moneys, Etc.*, 59 A.2d 154 (Pa. 1948). This case concerned unclaimed property and dormant accounts, a subject on which Congress had not acted. This theme follows throughout many of the other cases. Since Congress had not acted, state law applied and did not conflict with federal law, because there was no federal law.

* *State v. Northwestern National Bank of Minneapolis*, 18 N.W.2d 569 (Minn. 1945). This case again concerned unclaimed property, a subject on which Congress had not acted. It is to be emphasized that the property concerned was depositors' property and not the bank's property as in the instant case. Again, there was no conflict, because there was no federal law on unclaimed property of depositors.

* *National State Bank, Elizabeth, N.J. v. Long*, 630 F.2d 981 (3d Cir. 1980). The court indicated that national banks are subject to state law unless it expressly conflicts with federal law. Congress again had not

acted on the subject of redlining in home lending. Thus, there was no conflict and state law applied.

* *Federal Land Bank of St. Paul v. Lillenhaugen,* 404 N.W.2d 452 (N.D. 1987). Although not involving a national bank, this case also deals with federal preemption. Again, no actual conflict was found in this case, therefore there was no preemption.

Another similar case, cited by the State in its district court brief, concerned setoff law, another subject on which Congress had not acted. In *Biby v. Union National Bank of Minot,* 162 N.W.2d 370 (N.D. 1968), the North Dakota Supreme Court indicated that a national bank will be subject to state law so long as such law does not interfere with the purpose of the bank's creation and does not conflict with federal laws. There was no conflict in that case, as Congress had not acted. The lack of conflict is the key in the above cases and most of the others relied on by the State.

Another case extensively analyzed and relied on by the State in it's brief below is *Omaha National Bank v. Spire,* 389 N.W.2d (Neb. 1986), concerning a national bank challenge to the constitutionality of Nebraska's anti-corporate farming law. Despite the extensive analysis of that case, it really has no relevance to this situation. Nebraska's law provides for a five-year holding period for foreclosed farmland, which is the same as both federal and North Dakota banking laws, thus there was no conflict at that point. The only potential conflict might have been if the bank had asked the Comptroller of the Currency for an extension beyond the initial five years; this had not happened. In fact, it is not clear as to whether the initial five years had actually run. Certain provisions of Nebraska's law may apply to national banks, but no

decision was made as to what would happen in case of a conflict.

A recent case emphasizing that where Congress has acted or spoken on a subject, the federal law will apply, is *Ambro v. American National Bank and Trust Co.*, 394 N.W.2d 46 (Mich. App. 1986). The court indicated that the National Bank Act preempted state law in the area of wrongful discharge and precluded an officer of the national bank from making a breach of employment contract claim for damages against that bank. In this situation, Congress had acted, in the National Bank Act, to specifically cover this subject.

The State appears to be misreading the principles set forth by this Court in *Fidelity Federal Savings and Loan Association v. de la Cuesta*, 458 U.S. 141 (1982), in arguing that this case was improperly applied by the district court. Maybe the facts were not identical, but the language of the Court, at page 153, is instructive:

> "Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law."

The Court then went on to talk about the cases previously cited concerning conflicts and obstacles to the accomplishment of the full purposes and objectives of Congress. After that the Court then stated:

> "These principles are not inapplicable here simply because real property law is a matter of special concern to the States. The relevant importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail."

This gets to the very heart of the matter. The State cannot deny there is a conflict, thus federal law must prevail.

Two interesting cases, in which state courts have ruled on the effect of state statutes concerning the holding period for real estate owned by national banks, are very relevant to the situation at hand. In *First National Bank v. Commonwealth,* 137 S.W. 518 (Ky. 1911), the Kentucky court stated, at page 520:

> "We think that when a national bank exceeds the purpose of its creation, and goes beyond the scope of its functions as a national banking institution, that the state may deal with such of its transactions as are in excess of the authority conferred by Congress and in violation of the laws of the state, as it would deal with the business or property of any other banking corporation."

Later in the opinion, at page 521, in analyzing the National Bank Act provisions (this was prior to the time Congress allowed for an extension to the holding period by the Comptroller of the Currency) the court stated:

> "In this connection it is important to notice that Congress has provided that national banks shall not hold real estate acquired under mortgage, or to secure debts for a longer period than five years, thereby fixing the same period of limitation as is fixed in the Constitution and statute of the state for the holding of such property by state banks and other corporations.
>
> . . .
>
> "When the five years expires, the protection extended by Congress ends, and then these banks hold lands acquired as those involved in this controversy were, not under the act of Congress, but subject to the laws of the state."

It is important to note that the Kentucky court recognized that the federal law controlled and the state law would only take over after the time period in the federal law had run and the bank was no longer in compliance with that provision of the National Bank Act.

In *National Bank of Commerce v. State*, 368 P.2d 997 (Okla. 1962), the court ruled that statutes providing for recovery by the state of penalties against a corporation for holding real estate in contravention of those state statutes are not in conflict with the National Bank Act and are applicable to national banks. In this case, the holding period allowed was seven years. By the time a national bank would be in violation of the state statute, it would be well beyond the scope of the National Bank Act provisions (the Act at that time did not provide for an extension) and obviously would be in violation of federal law, in addition to the state law. That is much different than the situation in the current case. The Oklahoma court went on to indicate that state law would control where there was no federal statute expressly in conflict with that law. Also in this case, reporting requirements were discussed and made applicable to national banks. This is an area not conflicting with federal law and much different than divestiture requirements.

Much ado has been made by the State because Congress has not expressly preempted state law, or this type of state law, in question, nor does legislative history indicate preemption. This is perfectly understandable when one considers that the National Bank Act was passed in 1864. It is pure speculation whether Congress was concerned about, or even considered, the possibility of state laws such as the one in question; they probably did

not. Just maybe, Congress believed any conflicting state laws that did arise would be preempted. There was really no need to specifically preempt state laws that did not exist. As an example, North Dakota's anti-corporate farming law did not come up until 1932. If Congress were to start over today and enact a new version of the National Bank Act, it is very likely it would have to preempt these state laws because of attacks such as the one being made by the North Dakota Attorney General.

The State, in it's brief below, also wondered why the Comptroller of the Currency, in promulgating certain regulations, did not expressly preempt North Dakota's corporate farming law holding period for foreclosed real estate, especially if it is detrimental to national banks. A simple answer would be that the Comptroller believes, as national banks across the country and the North Dakota Bankers Association do, that the National Bank Act provisions control and there is no need to expressly preempt such law in North Dakota or any of the several states in a similar situation. Until this action was brought against the Bank, the exact question at hand had probably not arisen. Maybe other states either have, in their corporate farming laws, holding periods similar to that in the National Bank Act or have wisely left national banks alone to the Comptroller's regulation. The specific rules talked about in the State's brief below concern national bank real estate lending activities. These affect the safety and soundness of a bank in making loans; the Comptroller, at that time, was not as concerned with foreclosure and the holding period for foreclosed property, which is spelled out in the National Bank Act. In this

context, it is not surprising that the Comptroller did not address this issue.

Legislative intent was also discussed in detail in the State's brief in the district court. Although omitted by the State in its brief on appeal to the North Dakota Supreme Court, it may be pertinent at this time for comment. It was correctly stated that the legislative history of the 1981, 1983, and 1985 corporate farming bills is not conclusive. Any probability as to the intent is pure speculation. The State's district court brief discussed the committee deliberations and legislative intent on HB 1636, considered by the 1985 Legislative Assembly. The real intent of the sponsor, based on personal knowledge and involvement, is that he wanted to prevent any foreclosures at all. The original draft of the bill reduced the three-year holding period to one year, with the reasoning that lenders would not bother to foreclose if they could not hold the land any longer than one year. Also, most of the discussion with the sponsor (much of it not on the record) was concerned with out-of-state insurance companies and, to a certain extent, Federal Land Banks. The sponsor basically indicated he was having no real problem with banks and was not trying to get at banks, only the other lenders. Special frustration was voiced about the Farmers Home Administration. Lobbyists representing banking organizations were noncommittal about HB 1636 on purpose. There was a general belief that it would not apply to commercial banks, either national or state-chartered. That is the reason no strong opposition was expressed! There was also no desire to bring the specific banking law to the attention of the legislators, based on the anti-business mood, and offer them the opportunity to make

any modifications. Likewise, no attempt was made in any of the last several sessions of the Legislature to amend the corporate farming law to exempt banks, as they are already specifically exempt by both federal and state law.

Another issue of concern, not addressed by the State, is who enforces statutes against national banks. The court in *National State Bank, Elizabeth, N.J. v. Long,* 630 F.2d 981 (3d Cir. 1980) was very clear on this issue. It indicated that although national banks were subject to New Jersey's antiredlining statute, enforcement of such statute was the exclusive responsibility of the Comptroller of the Currency, rather than state officials. It's enforcement so directly implicated concerns in the banking field that the appropriate federal regulatory agency had jurisdiction. This principle should also apply in this case. The Attorney General of North Dakota should leave any enforcement in this area to the Comptroller of the Currency and spend his time in other areas of more concern to the state of North Dakota. The Comptroller is the proper person to enforce any laws against national banks, having the expertise available to determine what is proper and necessary for national banks. The Comptroller will not, and has not, ignored the National Banking Act in this regard, but is very concerned about national banks holding real estate longer than absolutely necessary. A Comptroller Interpretive Ruling found at 12 C.F.R. 7.3025(e) is evidence:

> "The bank must maintain current documentation reflecting its continuing and diligent efforts to dispose of each parcel of other real estate owned. Other real estate owned must be disposed of within the holding period permitted by 12 U.S.C. 29 at any time that prudent judgment dictates, but in no event later

> than the end of such holding period. However, if it at any time before the end of the holding period the bank can recover the amount of its original loan plus additional advances and other costs related to the loan or the parcel of other real estate owned, it should promptly dispose of the parcel. . . ."

If the Attorney General of North Dakota spends time on more serious matters, the Comptroller will enforce the National Bank Act in the appropriate situations and accomplish the same end result as desired by the corporate farming law. The State Banking Commissioner will do the same with state-chartered banks. But, it will be done in an orderly manner, by knowledgeable banking regulators, without threat by the North Dakota Attorney General and activist farm groups with the intent of stopping all foreclosures.

North Dakota commercial banks and their farm debtors have been very active in working out their own problems, especially through restructuring loans. If foreclosure is necessary, it is only as a last resort. Banks are not in the business of farming, and do not want to hold farmland any longer than necessary, but have a certain responsibility to their depositors, as well. This entire matter can be taken care of very easily through banking laws and established regulatory procedures. Banking law, not social policy, must control.

It is essential that the Writ be granted. If it is not, this same situation is likely to occur again and again, until ultimately resolved. Further, the precedent set in North Dakota could have dangerous and far-reaching implications on regulation of national banks by the Comptroller of the Currency.

CONCLUSION

For all of the reasons stated herein, the North Dakota Bankers Association, as *amicus curiae*, on behalf of its member banks, hereby respectfully urges the court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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No. 88-516

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

LIBERTY NATIONAL BANK AND TRUST COMPANY,
Petitioner,

v.

STATE OF NORTH DAKOTA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

BRIEF OF THE AMERICAN BANKERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION

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QUESTION PRESENTED FOR REVIEW

Whether the court below correctly decided that the National Bank Act, which establishes the allowable period for national banks to hold real estate acquired in satisfaction of debts previously contracted, does not preempt provisions of the North Dakota corporate farming law, which establishes a shorter holding period for national banks in North Dakota with respect to ranchland and farmland acquired in satisfaction of debts previously contracted.

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BRIEF OF THE AMERICAN BANKERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION

INTEREST OF THE AMICUS CURIAE

In this case, the Supreme Court of North Dakota held that the state's three-year maximum period for a "corporation" to hold farmland was applicable to the Petitioner, a national bank. This decision was made notwithstanding the fact that federal law authorizes the Petitioner to hold real estate for up to five years. As such, the decision represents a significant assault on the dual federal-state banking system.

In addition to its considerable independent importance, this case is important as a precedent for future state attempts to preempt federal statutes and regulations.

The American Bankers Association has long supported the dual banking system. The system reflects the philosophy and form of United States constitutional government, with its division of powers between the states and the federal government. The checks and balances of the system have contributed significantly to the vitality and progress of commercial banking, and have served as a deterrent to inappropriate or unduly burdensome actions at either the state or national level.

The American Bankers Association is the principal trade association of the commercial banking industry in the United States. There are member banks of the American Bankers Association located in each of the fifty states and the District of Columbia, including banks chartered by the Comptroller of the Currency (National Banks) and banks chartered by the states in which they are located (State Banks).

Almost four thousand commercial banks, primarily small ones, are classified as "agricultural banks," i.e., those with a minimum of twenty-five percent of their lending dedicated to the financing of farms or ranches.[1] In recent years, agricultural banking has experienced extreme difficulties. First, a period of rapid inflation in the value of farmland encouraged farmers to borrow (and banks to lend) in order to purchase additional acreage. This period of inflation,

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[1] Federal Deposit Insurance Corporation, Farm Bank Problems and Related Policy Options at 8-9 (1986).

ending in 1981, was swiftly followed by an equally rapid decline in the value of farmland. From 1982 to 1987 the average value of farmland in the United States declined by thirty-three percent. In North Dakota, the figure was thirty percent between 1981 and 1986. It was within this period of decline that Petitioner would have had to sell the property in question if North Dakota law applied.

From 1987 to 1988, average farmland values increased by seven percent in the region which includes North Dakota.[2] Petitioner's actual sale of the relevant property took place during this period of rising values, as allowed by federal law. The net effect of the fluctuations was that many farm borrowers were, for a period of time, unable to pay their debts to lenders, and the lenders found themselves without adequate security for the loans.[3] Not only did farms themselves fail, but so too did banks which financed them. Of the 138 commercial banks which failed in the United States in 1986, 59 were agricultural banks.[4] In 1987, that situation improved slightly so that 55 agricultural banks failed out of a total of 184.[5]

When a farmer or rancher is unable to repay a loan, often a bank's only recourse is to take title to

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[2] Compare: United States Department of Agriculture, *Agricultural Income and Finance: Situation and Outlook Report* at 18-19 (May 1988) and United States Department of Agriculture, *Farm Sector Financial Problems: Another Perspective* at 8-9 (May 1986) (attached hereto as Exhibits I and II).

[3] Federal Deposit Insurance Corporation, *supra* Note 1, at 24.

[4] *FDIC Insured Banks That Have Failed Or Been Rescued in 1986*, Am. Banker, Jan. 6, 1987, at 14 col. 1.

[5] *1987 Closings Fall Just Below Grim Forecast*, Am. Banker, Jan. 5, 1988 at 1, 3 col. 4.

property by foreclosure or in lieu of foreclosure, and then attempt to sell the property in order to make itself whole. Obviously, it is in the interests not only of the bank, but of the farmer or rancher as well, that the bank receives the best price for the land. In a depressed economy, however, the market value of agricultural property too often does not even approximate the balance of the outstanding loan. Compelling the sale of property at prices which are depressed to begin with, and often in competition with too many other simultaneous distress sales (which tends further to decrease prices) benefits no one. It makes far more sense to permit lenders to hold the land until the market recovers, and that is the sensible choice that Congress made for national banks—most recently in 1980 and 1982.

If a state chooses to force its own state-chartered financial institutions to conduct "fire sales" of property taken in foreclosure, we consider it unfortunate, but acknowledge that it is the state's right to do so. It is not the state's right, however, to impose the same rules upon financial institutions chartered by the United States. It is to represent the interests of those institutions that the ABA respectfully submits this brief as amicus curiae.

ARGUMENT

I.

Whether States May Impose A Shorter Limit On The Time A National Bank May Own Real Estate Than The Period Established By Federal Statute Raises A Substantial Question Of Federal Law Which Should Be Decided By This Court.

This Court has long recognized that state laws may be preempted by federal statutes, *Pacific Gas and Electric v. Energy Resources Commission*, 461 U.S. 190 (1983). This federal preemption may result from explicit preemptive language or it may be implied. In *Pacific Gas and Electric*, this Court set forth that Congress' intent to preempt state law may be implied if there is a:

> 'scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,' because the Act 'of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject,' or because 'the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose.'

461 U.S. at 204 (citations omitted).

This Court categorized the circumstances in which federal preemption will be found:

> [S]tate law can be preempted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is preempted . . . . If Congress has not

> entirely displaced state regulation over the matter in question, state law is still preempted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law.

Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984) (citations omitted).

Preemption in this case may most obviously be found on the basis of actual conflict. Title 12 U.S.C. Section 29 permits Petitioner to hold the real estate in question for five years while Section 10-06-13 of the North Dakota Century Code purports to limit Petitioner to holding the same real estate for three years. As discussed by the court below, the purpose of allowing a national bank to hold such real estate is to avoid "the adverse consequences of forced divestitures on the banks." *State of North Dakota v. Liberty National Bank*, 427 N.W. 2d 307, 311 (1988). As Congress found a *five* year period to be necessary to protect the safety and soundness of national banks from losses due to "fire sales" of repossessed real estate, then any state law which forces national banks to sell this real estate earlier than allowed by Congress "stands as an obstacle to the accomplishment of the *full* purposes and objectives of Congress." *Silkwood*, 464 U.S. at 248 (emphasis added).

In addition to the actual conflict between the North Dakota and federal statutes, the state statute is preempted because "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Pacific Gas and Electric*, 461 U.S. at 204. The federal legislative history recited by the North Dakota Supreme Court demonstrates that the federal interest

in regulating ownership of real estate occupies this area of the law to such an extent that the state statute involved is preempted.

II.

Review Of The Decision Of The North Dakota Supreme Court Is Necessary To Resolve An Unsettled Issue of Federal Law.

As noted above, this case involves the ability of a state to override the provisions of 12 U.S.C. Section 29 which limit how long a national bank may hold real property acquired in lieu of foreclosing on a delinquent mortgage. The North Dakota statute allows Petitioner, a national bank, to hold the real estate in question for only three years while Federal law permits Petitioner to hold the same property for five years. N.D. Cent. Code § 10-06-13; 12 U.S.C. § 29. While the property involved in this case has been sold by Petitioner, the holding by the court below still involves a "live" issue because the underlying dispute in this case is "capable of repetition, yet evading review." *Murphy v. Hunt*, 455 U.S. 486 (1982). The period of time in which a case presenting this issue can arise is the two years between the end of the North Dakota statute's three-year maximum holding period and the National Bank Act's five-year limit. A two year period is not normally sufficient for such a case to work its way up to this Court for resolution. For example, even in this relatively speedy case, where the trial court granted a summary judgment and there was no intermediate state appellate court involved, the federal five-year limit passed on September 19, 1988, even before the petition for writ of certiorari was due in this Court. If certiorari is not

granted because the farm involved was sold after the action was commenced, but within the federal five-year limit, then it is unlikely that this issue could ever be reviewed, even though the issue is likely to arise repeatedly in the future. In addition to North Dakota, there are at least two other states with statutes which have limitations on banks holding real estate which are less than that set out at 12 U.S.C. Section 29. *See* N.C. Gen. Stat. § 53-43(3)(c) (1 year); 7 Pa. Cons. Stat. § 202 (2 years).

National banks in these states, as well as North Dakota, will be faced with the same conflict between state and federal statutes. This clearly gives rise to an important question of federal preemption of the state statutes. The overriding issue of federalism involved in this case goes to the very core of the dual banking system and since no federal court has spoken on this precise issue, this Court should settle the question authoritatively by granting certiorari and issuing an opinion in this case.

III.

The Case Was Decided Incorrectly By The Supreme Court Of North Dakota.

Even though it has correctly identified the issue in this case, federal preemption, and cited several of this Court's decisions in the area, the court below has simply erred in applying the relevant law to the facts of this case. The North Dakota court's most obvious error was in finding that there is no "actual conflict" between 12 U.S.C. Section 29 and N.D. Cent. Code Section 10-06-13. The federal statute allows a national bank to hold the property in question for five years while the North Dakota statute limits the same na-

tional bank's ownership of the same property to three years. This is a conflict, pure and simple, unless three years equals five years.

The North Dakota court's long and learned discussion of the two statutes and their legislative histories is, for the most part, irrelevant to the issue of actual conflict. The discourse on this issue by the court below appeared to be an effort to reason that, since the United States Congress and the North Dakota Legislature had similar goals and objectives, the two statutes do not conflict. 427 N.W. 2d at 310-14. It is neither the intentions of the state legislature nor the public policies involved which determine if there is a conflict, it is the substance of the statute involved and the "purposes and objectives of Congress." 427 N.W. 2d at 314. As the court below recognized, the state statute may not stand as an obstacle to the execution of Congressional intent.

The North Dakota court recognized that one of the objectives of Congress was to "provide a measure of protection to banks" 427 N.W. 2d at 315, by allowing them to hold foreclosed real property for long enough to increase the chances that it could be sold at a price "reflecting the bank's investment" 125 Cong. Rec. 14,599 (1979) (Letter from John G. Heimann, Comptroller of the Currency, to William Proxmire, Chairman, Committee on Banking, Housing and Urban Affairs, U.S. Senate, dated May 31, 1979). The court clearly erred, however, by denominating this objective of Congress as "secondary." One has only to look at the elaborate scheme of banking statutes enacted over the years by Congress to determine that the safety and soundness of banks are of paramount importance. That is why, for example, there is federal

deposit insurance protecting deposits in all FDIC-insured banks. *See Gunter v. Hutcheson*, 674 F.2d 862, 870 (11th Cir.), *cert. denied*, 459 U.S. 826 (1982). That is why federal banking regulatory agencies have been given the authority to take administrative action, including the issuance of cease and desist orders and the suspension and removal of bank directors, officers and employees in the event that a bank is engaging in "an unsafe or unsound practice." 12 U.S.C. §§1818(b), (e), (g) (1980, 1985 Supp.). *See also* S. Rep. No. 1482, 89th Cong., 2d Sess. (1966), *reprinted in* 1966 U.S. Code Cong. & Ad. News 3532-3533. That is why the various federal banking regulatory agencies have been granted the power to conduct periodic examinations of virtually all of the activities of commercial banks. 12 U.S.C. §§ 325, 338, 481, 1820 (1980, 1985 Supp.). That is why there are prohibitions against use of bank deposits for risky or speculative operations. H.R. Rep. 150, 73d Cong., 1st Sess. (May 19, 1933).

As recognized by the court below, national banks "are instrumentalities of the federal government, and are necessarily subject to the paramount authority of the United States." 427 N.W. 2d at 309 (citing *First National Bank v. Missouri*, 263 U.S. 640, 656 (1924)). If North Dakota can override federal statutes and place limits on ownership of real estate by these federal instrumentalities, then it can regulate the ownership of real estate by other federal instrumentalities in contravention of federal statutes. Even the Supreme Court of North Dakota has not suggested that North Dakota can exercise such control over the Federal Deposit Insurance Corporation or the Postal

Service which, like a national bank, are chartered by the authority of the United States.

In summary, 12 U.S.C. Section 29 establishes the period for which a national bank may hold real estate and preempts the shorter period prescribed by the North Dakota statute. This preemption arises from the actual conflict between the state and federal statutes and the dominant federal interest in this area which precludes enforcement of the state statute covering the same subject. The decision of the North Dakota Supreme Court is at variance with the rulings of this Court. It should not be permitted to stand unreviewed and unreversed.

CONCLUSION

For all the reasons stated herein, the American Bankers Association, as amicus curiae, respectfully urges the Court to grant the petition for writ of certiorari.

Respectfully submitted,

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October 28, 1988

EXHIBITS

EXHIBIT I

United States Department of Agriculture

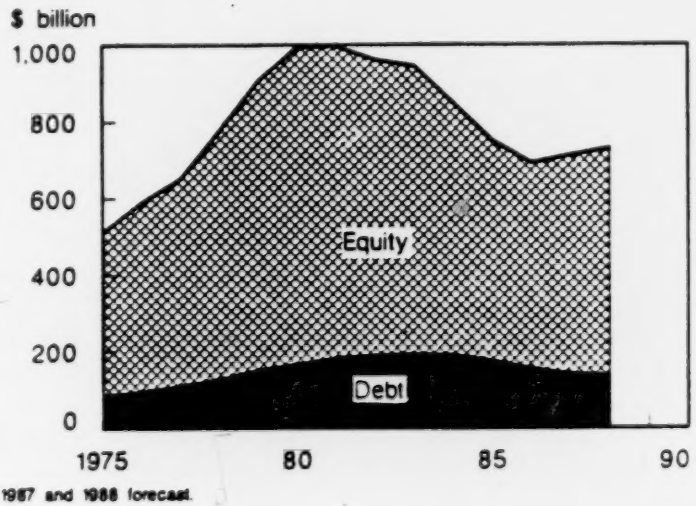
Economic Research Service

AFO-29
May 1988

Agricultural Income and Finance

Situation and Outlook Report

Farm Equity Up Again in 1988



1987 and 1988 forecast.

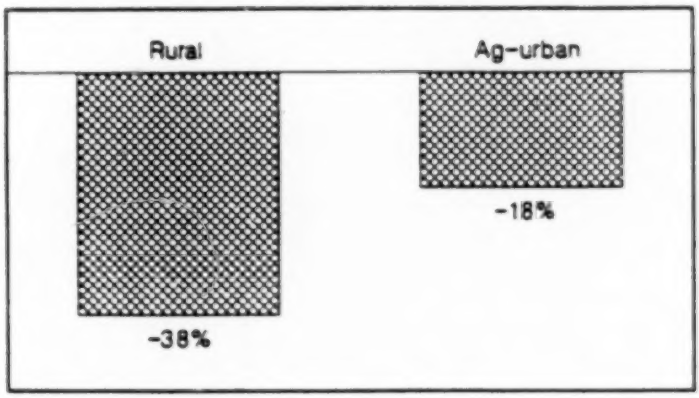
Figure 9

Percent Change in Farmland Value Per Acre, February 1987-88, By Farm Production Regions

[18]

Figure 10

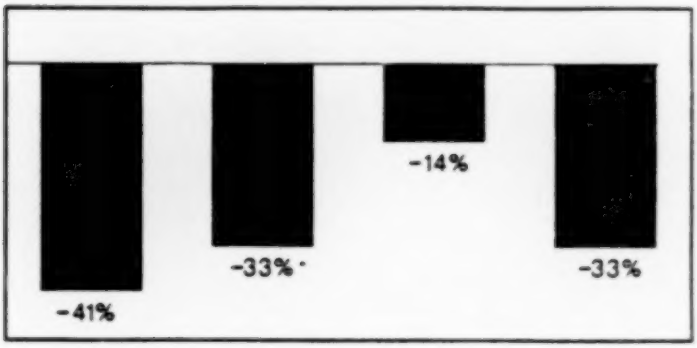
Percent Change in Farmland Value in Ag-Urban and Rural Counties, 1982-87



Excludes Alaska and Hawaii
Source USDA Survey of ASCS County Executive Directors

[19]

Figure 11
Percent Change in Farmland Value by Type, 1982-87



Excludes Alaska and Hawaii
Source: USDA Survey of ASCS County Executive Directors

Figure 12
Change Between Peak in Regional Farmland Value and 1987 Value

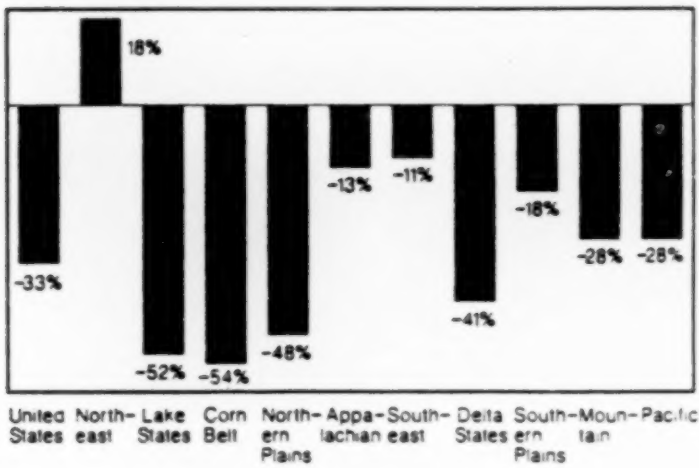


EXHIBIT II

United States
Department of
Agriculture

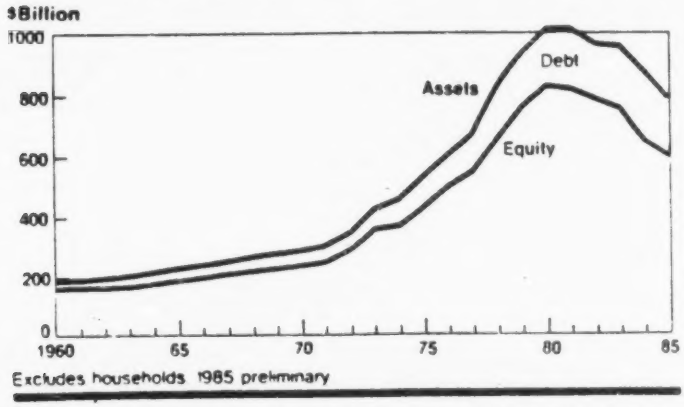
Economic
Research
Service

Agriculture
Information
Bulletin
Number 499

Farm Sector Financial Problems: Another Perspective

Figure 4

Farm Assets and Equity



Excludes households 1985 preliminary

Falling equity characterizes the farm financial crisis most vividly. Many farmers who borrowed heavily in the late 1970s were not able to cover debt payments from farm earnings alone. Instead, they counted on being able to occasionally borrow against rapidly rising equity values to meet cash flow needs.

Thus, for them, all that was needed to bring on a crisis was for farmland inflation to slow. As we know, land values not only rose more slowly, but actually declined after 1981 (fig. 5).

Farm Debt-to-Asset Ratio Deceptive

Despite rapidly rising debts in the 1970s, the aggregate ratio of debts to assets stayed deceptively stable because asset values also rose rapidly (fig. 6). When asset values began to drop after 1981, the debt/asset ratio soared. Although debts were no longer rising much, asset values were falling.

The farm sector in the 1970s was considered financially solid because its ratio of debts to assets was running well below that typical of other sectors of the economy. That view can be misleading because agriculture uses more capital relative to sales than other sectors of the economy. Most *Fortune 500* corporations, for example, have annual sales in excess of total company assets.

Figure 5

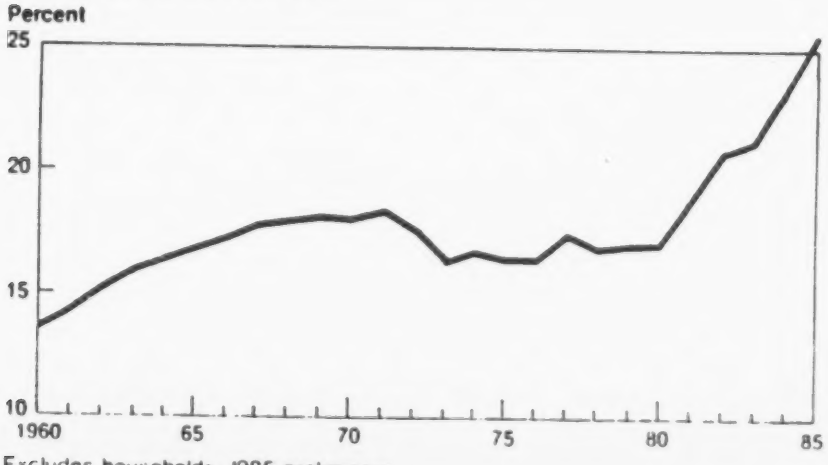
Percent Change in Average Value of Farm Real Estate Per Acre

Top No. Change from 1985 to 1986
Bottom No. Change from 1981 to 1986

April 1, 1985 - February 1, 1986 and
February 1, 1981 - February 1, 1986

Figure 6

Farm Debt-to-Asset Ratio



Excludes households. 1985 preliminary.